Supreme Court, U.S.
FILED
051285 APR 6 - 2006
OFFICE OF THE CLERK

No. (1)

In The
Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

Petitioners,

vs.

TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JON METROPOULOS
(*Counsel of Record*)

GOUGH, SHANAHAN, JOHNSON & WATERMAN
33 S. Last Chance Gulch
P.O. Box 1715
Helena, MT 59624-1715
Phone: (406) 442-8560
Fax: (406) 442-8783

Attorney for Petitioners

April 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a federal statute, 25 U.S.C. §1301(2), violates the fundamental constitutional right of American Indians, who are citizens of the United States, to equal protection under the law guaranteed by the Fifth Amendment of the Constitution by subjecting nonmember Indians, but no other similarly situated nonmembers of a different race, to criminal prosecution and punishment by Indian tribes, the judicial proceedings of which are not constrained by the Constitution?

2. Whether the same federal statute violates the fundamental right of citizens of the United States to due process of law guaranteed by the Fifth Amendment of the Constitution by subjecting them to criminal prosecution and punishment by extraconstitutional sovereigns. Indian tribes, within the borders of the United States but unconstrained by the Constitution, which sovereigns, because of their racially and ethnically exclusive nature, deny them the right of full and equal participation in their political life?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners, Thomas L. Morris and Elizabeth S. Morris, and the Respondent, Judge Tanner, of the Tribal Court of the Confederated Salish and Kootenai Tribes, the United States intervened in this matter as a Defendant on March 14, 2002.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
I. Federal Common Law and Statutory Background	8
II. Proceedings Below	12
Reasons for Granting the Petition	14
I. The Apparently Egregious Equal Protection and Due Process Violations at the Foundation of the 1990 Amendments Warrant Settlement By the Court to Protect Our Jurisprudence on These Fundamental Matters	17

TABLE OF AUTHORITIES

Page

FEDERAL AUTHORITIES

1991 Defense Appropriations Act, Pub. L. No. 101-511, § 8077 (b)-(d), 104 Stat. 1856, 1892-93 (1990)..... 3, 9

18 U.S.C. § 1153 ..... 9, 10, 11

25 U.S.C. § 1301 ..... 2, 3, 9, 12

25 U.S.C. § 1302 ..... 6, 12

28 U.S.C. § 1254 1

28 U.S.C. § 1292 3

28 U.S.C. § 1331 3

136 Cong. Rec. H13556, H13596 (Oct. 24, 1990)..... 11

H.R. Conf. Rep. No. 101-938, pt. 2 (1990)..... 11

Law and Order Code of the Confederated Salish and Kootenai Tribe ("CSKT") (2003) 1-2-202(5) 13

U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375 ..... 11, 15

U.S. Const. amend. V..... 2, 3, 13

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).....7, 15, 16, 18, 19

Agostini v. Felton, 521 U.S. 203 (1997)..... 7

Batson v. Kentucky, 476 U.S. 79 (1986)..... 13

Duro v. Reina, 495 U.S. 676 (1990).....*passim*

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938)..... 10

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 19

TABLE OF AUTHORITIES – Continued

Page

Hirabayashi v. U.S., 320 U.S. 81 (1943) 19

Korematsu v. U.S., 323 U.S. 214 (1944) 19

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) 1, 3, 6, 14

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 8

Morris v. Tanner, 288 F.Supp. 2d 1133 (D. Mont. 2003) 1, 14

Morris v. Tanner, 160 Fed. Appx. 600 (9th Cir. 2005) 1, 3

Morton v. Mancari, 417 U.S. 535 (1974) 5, 6, 7, 14

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 4, 8, 9

Powers v. Ohio, 499 U.S. 400 (1991) 13

Reid v. Covert, 354 U.S. 1 (1957) 9

Rice v. Cayetano, 528 U.S. 495 (2000) 7

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ... 5, 6, 12

Talton v. Mayes, 163 U.S. 376 (1896) 6

United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979) 10

United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) 10, 11

United States v. Ives, 504 F.2d 935 (9th Cir. 1974) 10

United States v. Lara, 541 U.S. 193 (2004) 3, 4, 8, 14, 16

United States v. Rogers, 45 U.S. 567 (1846) 9, 10, 11

Woirhaye v. Montana Fourth Judicial District Court, 292 Mont. 185, 972 P.2d 800 (1998) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas Lee Morris and Elizabeth S. Morris hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but found at *Morris v. Tanner*, 160 Fed. Appx. 600 (9th Cir. 2005) (unpublished). It is reproduced in the Appendix at App. 1-3. The opinion of the District Court is reported as *Morris v. Tanner*, 288 F.Supp. 2d 1133 (D. Mont. 2003). It is reproduced in the Appendix at App. 28-29.

The opinion of the Court of Appeals in *Means v. Navajo Nation*, also relevant to this case, is reported as *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005). It is reproduced in the Appendix at App. 57.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered December 22, 2005. A timely petition for rehearing and rehearing *en banc* was denied on December 22, 2005. This Court, in an order dated March 13, 2006, allowed Petitioner Morris up to and including April 6, 2006, in which to file this Petition for Writ of Certiorari. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment*: The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . " U.S. Const. amend. V.

B. *25 U.S.C. § 1301*: For purposes of this title [25 U.S.C. §§ 1301, et seq.], the term –

> 1) "Indian Tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> 2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
>
> 3) "Indian court" means any Indian tribal court or court of Indian offense; and
>
> 4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an

offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1301.[1]

STATEMENT OF THE CASE

The federal district court for the district of Montana had jurisdiction over this matter under 28 U.S.C. § 1331. The Ninth Circuit Court of Appeals had jurisdiction to review that decision under 28 U.S.C. § 1292. The Ninth Circuit's decision in this case was dictated by its decision in *Means v. Navajo Nation*, 432 F.3d 924 (2005), App. 57-79, in which it provided its substantive constitutional analysis.[2] The Ninth Circuit denied Mr. Means' petition for rehearing and rehearing *en banc* on March 22, 2006. In both *Means* and *Morris*, the plaintiffs presented challenges to the 1990 Amendments based on their Fifth Amendment equal protection and due process rights. *Means*, 432 F.3d at 929, *Morris*, 160 Fed. Appx. at 600.

In *United States v. Lara*, 541 U.S. 193 (2004) (Breyer, J. writing for the majority; Stevens, J. concurring in the opinion; Kennedy, J. and Thomas, J. concurring, separately, in the judgment; Souter, J. dissenting), the Court

[1] The act of Congress specifically at issue is the amendment of 25 U.S.C. § 1301 embodied in the Act of November 5, 1990, §§ 8077(b)-(d), 104 Stat. 1892-1893 (temporary legislation until September 30, 1991), as made permanent by the Act of October 28, 1991, 105 Stat. 646, which added the recognition and affirmation of a tribe's inherent power to prosecute "all Indians," in subsection (2), and added subsection (4). They are referred to herein as the 1990 Amendments.

[2] Consequently, the citations to the lower court's opinion in this Petition reference the Circuit's *Means* decision.

reserved from decision these two challenges to the 1990 Amendments. In *Lara*, the Court held they are not a delegation of federal power but a Congressional revival by recognition of tribal inherent sovereign power that overruled this Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Court had held tribes lack jurisdiction to prosecute non-member Indians, just as it had previously held tribes lack the authority to prosecute non-member non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The 1990 revival of this inherent tribal power, the Court held in *Lara*, meant that the Fifth Amendment double jeopardy proscription did not prevent a subsequent federal prosecution.

The particular questions reserved in *Lara* were: (1) whether a Congressional statute "recogniz[ing] and affirm[ing]" the "inherent" authority of a tribe to bring a criminal prosecution against Indians who are not members of that tribe but no non-Indian person violates the fundamental right of equal protection; and (2) whether this statute violates the fundamental right of all citizens to due process, because it subjects citizens of the United States to criminal trial and punishment, including imprisonment, by an "extraconstitutional," "third sovereign", *Lara*, 541 U.S. at 212-13 (Kennedy, J. concurring), within the borders of the United States but not created or authorized by the Constitution, that does not afford defendants all the rights provided by the Bill of Rights and, in fact, excludes them from political participation in the tribe's affairs on the basis of their race or ethnicity.[3]

---

[3] Indian tribes are racially exclusive because no person who is not an Indian may be a member of an Indian tribe. They are ethnically exclusive because their membership is restricted further, excluding even Indians who are not descended from the appropriate tribe or tribes. Thus, qualification for tribal membership is expressed in terms

(Continued on following page)

The United States and tribal defendants argue the distinction is "political," not racial, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) (federal employment preference for Indians in the Bureau of Indian Affairs was not racial discrimination but was reasonable and rationally designed to further Indian self-government). They argue this is so because the 1990 Amendments swept into Tribes' criminal jurisdiction Indians who are enrolled members of a tribe and perhaps other racial "Indians," but not all Indians.

The Ninth Circuit recognized "the equal protection argument has real force." App. 69. It noted:

> [A]lthough the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation. (Citing *Oliphant*, 435 U.S. at 194.) This makes Means' case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the

---

f "blood quantum." *See* Constitution of the Confederated Salish and Kootenai Tribes, as amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." Using their own inherent sovereign power, of course, tribes have been authorized to further limit membership in ways repugnant to the Constitution based on immutable factors. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding the equal protection guarantee in ICRA did not allow a federal remedy against a tribal membership law that excludes the children of female members who marry outside the tribe but extends membership to the children of male members who marry outside the tribe. *Id.* at 51-55.

> State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[4] As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

Id. at 932.

Notwithstanding this, the Ninth Circuit found *Morton v. Mancari*, 417 U.S. 535 (1974), held "that federal statutory recognition of Indian status is 'political rather than racial in nature,'" despite noting that *Mancari* concerned the "distinguishable context of Indian employment preferences by the federal government." *Means*, 432 F.2d at 932. *See also Duro*, 495 U.S. at 689-90 (emphasizing the importance of the distinction between Congressional and administrative provisions treating Indians "as a single large class with respect to *federal* jurisdiction" as opposed to

---

[4] Original footnote: "*See Talton*, 163 U.S. at 382-85, 16 S.Ct. 986; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are imposed. They are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)." *See also Nevada v. Hicks*, 533 U.S. 353, 383-85 (2001) (Souter, J. concurring, joined by Kennedy, J. and Thomas, J.).

"*tribal* power to treat Indians by the same broad classification.") Rejecting the argument that *Mancari* had been "undermined" by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), because, it noted, the Court and the Ninth Circuit continue to "rely" on *Mancari*, the Circuit Court held it was "bound to follow it under the doctrine of *Agostini v. Felton*," 521 U.S. 203, 237 (1997).[5] As support for this proposition, the lower court cited *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000), without addressing the fact that this Court, in *Rice*, and in *Mancari*, carefully noted "the case was confined to the authority of the BIA, an agency described as 'sui generis.'" *Rice*, 528 U.S. at 520; citing *Mancari*, 417 U.S. at 554. *See also Duro*, 495 U.S. at 689-90, noting same distinction.

The Ninth Circuit rejected the facial due process challenge out of hand, describing it as having "no force." App. 75. The Circuit held:

> Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, (citing *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896),) the Indian Civil Rights Act confers all the criminal procedure protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed counsel if he cannot afford an attorney. (Citation omitted.)

---

[5] *Agostini* reaffirmed that "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which **directly controls**, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini*, 521 U.S. at 237, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). (Emphasis added.)

> The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor. (Citation omitted.) The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction. (Citation omitted.) Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

App. 75-76.

The Ninth Circuit did not address the issues raised by a federal statute subjecting U.S. citizens to criminal trial and punishment by an extraconstitutional sovereign unconstrained by the Constitution and which, by its very nature, excludes them from participating in its political life because of their race or ethnicity. Thus, it did not address the "elementary principle" of the "constitutional structure and the consent upon which it rests," which guarantees "political freedom" and liberty. *Lara*, 541 U.S. at 213 (Kennedy, J. concurring). *See also Duro*, 495 U.S. at 694, quoting from the dissent of Stevens, J. from the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-73 (1982), noting that nonmembers of a tribe "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."

I. Federal Common Law and Statutory Background.

The Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes no longer retain inherent sovereign authority to exercise criminal jurisdiction over nonmembers who are non-Indians, *id.* at 194, and that revival of such power would require a

Congressional delegation of federal power. *Id.* at 211-12. In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that under federal common law Indian tribes also lack this jurisdiction over nonmembers who are Indians. *Id.* at 682. Finding no principled reason for nonmember Indians but not non-Indians to suffer the disability of criminal trial and punishment by an extraconstitutional sovereign, the Court held "Tribe's powers over [nonmember Indians] are subject to the same limitations." *Id.* at 688. While recognizing that Congress might address any "jurisdictional gap" that existed from the lack of tribal criminal jurisdiction over nonmember Indians, *id.* at 692, the Court also noted that "[c]riminal trial and punishment" is a "serious intrusion on personal liberty," and that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957)." *Id.* at 693 (parallel citations omitted).

Before the year was out, in the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §§ 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990), and without holding a hearing, Congress overturned that holding by amending 25 U.S.C. § 1301 to state that the phrase "powers of self-government" "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. . . . " The only limit on the term "all Indians" was reference to the case law under 18 U.S.C. § 1153, the Indian Major Crimes Act, defining who is an "Indian."

Decisions under that section, beginning with the seminal case of *United States v. Rogers*, 45 U.S. 567 (1846), make it clear the primary, indispensable and

immutable factor for classification as an "Indian" is racial. As the Court held in *Rogers*, a non-Indian adopted by a tribe may make himself

> . . . amenable to their laws and usages. Yet he is not an Indian; and the exception (in the predecessor to 18 U.S.C. §1153) is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, – of the family of Indians. . . .

Rogers, 45 U.S. at 572-73.

The case law since 1846 has not diverged from this. Rather, the cases consistently note the obvious: the racial aspect of the issue as to who is an "Indian" for purposes of 18 U.S.C. § 1153 is indispensable, while the political aspect – enrollment in a tribe or, indeed, non-enrollment – is not determinative. *See United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979) (While enrollment is the common evidentiary means of establishing Indian status, it is not the only means nor is it necessarily determinative.); *U.S. v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *U.S. v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed

in *U.S. v. Rogers*, 45 U.S. 567 (1846): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, it is clear that race is the one indispensable and immutable factor in this determination.[6]

Although the language of the 1990 Amendments referring to "all Indians," by itself, requires no reference to legislative history, the House Report accompanying the amendments, H.R. Conf. Rep. No. 101-938, pt. 2 (1990), 136 Cong. Rec. H13556, H13596 (Oct. 24, 1990), only confirms the point, revealing Congress' intent to make a racial, not political, distinction. The Report noted that the cases under 18 U.S.C. § 1153 "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians . . . was clarified in *U.S. v. Rogers*, 45 U.S. 567 (1846), where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375.

The legislative history reveals the same intent: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted.) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." *Id.* (The rationale provided by Congress for doing this is, essentially, that there was a purported "gap" in

---

[6] Significantly, beyond race, defining who is or is not an Indian is "very imprecise." *Dodge, supra.*

jurisdiction after *Duro* to prosecute crimes allegedly committed by nonmember Indians on reservations and that these crimes "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.)

By these amendments, therefore, Congress subjected nonmembers who are Indians, but no others, to trial and punishment, which includes imprisonment for up to one year and a fine of up to $5,000 for each offense, 25 U.S.C. § 1302(7), by Indian tribes using, in that process, their extraconstitutional inherent sovereign power. Thus, they are not constrained by the Constitution but are only limited, to some extent, by ICRA, 25 U.S.C. §§ 1301, *et seq.*, and the only federal remedy is habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978). Congress explicitly specified only members of one race, American Indians, for such treatment. It left nonmembers of any other race but who are no less or more authorized to be on an Indian reservation free from the threat of criminal prosecution by Indian tribes. It appears Congress did so, in large part, to relieve state and federal law enforcement of having to deal with "the most tedious crimes." *Id.*

II. Proceedings Below.

Petitioner Thomas Morris was cited by a tribal police officer of the Confederated Salish and Kootenai Tribes with a criminal violation – speeding – of the Tribes' code. App. 48. At his first appearance in tribal court, Mr. Morris moved to dismiss the charge on the ground the Tribes lack jurisdiction to try and punish him. The same day, Mr. Morris filed a complaint in federal district court raising the same issues. The tribal court, and the tribal appellate court, ultimately ruled the tribes have jurisdiction to try and

punish Mr. Morris. By agreement of the parties, the prosecution of Mr. Morris in tribal court has been stayed pending the resolution of this matter in the federal courts.

An illustrative and significant factual distinction between prosecution in the CSKT Tribal Court and Montana state district court concerns the right to a jury. If Mr. Morris was prosecuted in state district court, which he will be if this Court rules in his favor, he would have a right, under Montana law to a jury trial, *Woirhaye v. Montana Fourth Judicial District Court*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998), and the jury would have to be seated in conformity with state and federal constitutional requirements. *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986). In fact, Thomas' mother, Elizabeth Morris, also a nonmember but not an Indian, would have this right under the same accusation. In Thomas' case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, Law and Order Code of the Confederated Salish and Kootenai Tribe ("CSKT") (2003) 1-2-202(5), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* at 1-2-601.

The federal district court initially declined to address Morris' Fifth Amendment equal protection and due process claims. App. 35. After remand from the Ninth Circuit, App. 19, it held that the distinction Congress made in the 1990 Amendments between nonmember Indians, which it subjected to tribal criminal jurisdiction, and nonmember non-Indians, which it did not treat in this way, is "political" and not "racial." It relied for this holding on *Morton v. Mancari*, 417 U.S. 535 (1974). Consequently, it did not subject the 1990 Amendments to strict scrutiny, requiring

instead only a rational basis, which it found in Congress' policy of promoting tribal self-government.

Morris again appealed. The Ninth Circuit ultimately affirmed the lower court in an Amended Memorandum filed December 22, 2005, but did not issue a substantive opinion, since it was bound by its prior ruling in *Means v. Navajo Nation*, 432 F.3d 924 (2005), filed December 13, 2005. The lower court therefore also rejected Morris' motion for rehearing and rehearing *en banc* on December 22, 2005. On March 22, 2006, it also rejected Means' motions for rehearing and rehearing *en banc*. App. 56. The Circuit's opinion in *Means*, therefore, provides the rationale for its holding in *Morris*.

REASONS FOR GRANTING THE PETITION

There is not conflict among the circuits here that Morris can discern, except perhaps the comparison between the fact that Congress must comply with the equal protection and due process clauses when enacting legislation under its general Commerce Clause power with its license, according to the Ninth Circuit and Respondents, under the Indian Commerce Clause resting on the legal fiction that the classification "Indian" is political, not racial. But the equal protection and due process questions reserved from decision in *Lara* concern perhaps the most fundamental structural principles in the Constitution relating to and protecting individual citizens' rights. These are important questions of federal law this Court should settle.

Resolution of the equal protection questions relates directly to only 4.1 million American citizens – Indians. They should not be shunted off the now well-trod and much fought-over road to protection and respect for equal rights on the grounds of a fiction such as that employed here – that the classification "Indians" is not first, foremost, and always a racial classification, but a "political" one. *Adarand*, 515 U.S. at 240 (Thomas, J. concurring); *Lara*, 541 U.S. at 214 (Kennedy, J. concurring).

The due process question is, however, even more compelling, and perhaps more currently at issue for the Nation at large. It asks no less than whether Congress, when exercising well-recognized constitutional powers, may place American citizens outside the protections of the Constitution for purposes of criminal prosecution and punishment for their actions within the confines of the country. This question concerns not aliens or even American citizens who, it might be demonstrated, pose a threat to the Nation and the lives and property of its people through acts of war.

Rather, it concerns American citizens who happen to be on an Indian reservation, whether living there or passing through, and are accused of a misdemeanor, a "tedious" crime other law enforcement, it was claimed, prefer not to handle. U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 373. This question does not concern "only" Indians. It is separate from the equal protection question. If Congress has the power, constitutionally, to subject Indian citizens to such extraconstitutional treatment, there is no principled reason it would not also have the power to do so with non-Indian citizens, at least in circumstances it deems warranted. Moreover, if it can do so when Americans are

in certain, specified **federal** Indian reservations, there is no reason it could not do so when they are in other, or all **federal** locations, such as Military reservations, territories, wilderness areas, National Parks, or Washington, D.C. Such power is "of major significance to [the] understanding and interpretation of the Constitution . . . and most doubtful" and "unprecedented." *Lara*, 541 U.S. at 211, 212 (Kennedy, J. concurring).

Morris respectfully submits these questions warrant this Court's immediate attention and settling.

If the "fiction" that consent to be a member of one Indian tribe is consent to the inherent sovereign power of all Indian tribes – including their power to imprison – makes "Indian" merely a "political" and not a racial classification, even though only American citizens of the Indian race are adversely impacted, then the 4.1 million Americans who are Indians, and their relatives, should have that explanation from this Court. The public understanding of the law, especially that segment directly and adversely affected by it, deriving from this Court's pronouncements more than any source, is of course vital to our political and legal life. As it is, to the common citizen, the law at issue appears to be a racial classification pure and simple.

Similarly, if Congress has the constitutionally valid power to relegate American citizens to criminal trial and punishment, including potentially imprisonment, by an extraconstitutional tribunal, unconstrained by the Constitution, for mere misdemeanors, American citizens of all races, Indians or not, should know the source, the reason, the location and the limit, if any, of such power.

I. THE APPARENTLY EGREGIOUS EQUAL PROTECTION AND DUE PROCESS VIOLATIONS AT THE FOUNDATION OF THE 1990 AMENDMENTS WARRANT SETTLEMENT BY THE COURT TO PROTECT OUR JURISPRUDENCE ON THESE FUNDAMENTAL MATTERS.

First, there are American citizens, nonmember Indians, languishing in tribal jail facilities, who were tried and convicted by a sovereign that was not required to comply with the Constitution and which excluded them from full and equal political participation because of their ethnicity – they lacked the requisite amount of "blood quantum" to be a member of that tribe. In almost all cases, if they were allowed a jury under tribal law its venirepersons were, by tribal law, exclusively tribal members – i.e. no person of the defendants race or ethnicity would have been allowed on the panel. Whether these criminal defendants were guilty of crimes or not, their subjection, by Congress, to such "extraconstitutional" power is, if not unjust, begging for explanation as to how it is fair.

Indians may be the quintessential minority in the United States. Their numbers are small – 4.1 million citizens affiliated with a tribe, according to the latest census, 1.7 million of which are enrolled tribal members[7] – and they are scattered from corner to corner of the country, with 556 federally-recognized tribes residing on

[7] U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment."

reservations in virtually every state of the Union. They are among the poorest of the poor. In the rural areas of the West, out of sight, many live in forlorn poverty. In many urban areas of the West and beyond, including Seattle, Portland, Albuquerque, Phoenix, Denver, and Minneapolis they are perhaps more prominent as they constitute a disproportionately large number of the homeless and fringe-dwellers. While tribal governments have budgets, departments, police forces and courts, as well as lobbyists and the institutional support of the U.S. Department of Justice, many though certainly not all Indians, as individuals, live in exceedingly difficult straits.

Their interests and rights can easily be overlooked, especially when they are considered as a racial group rather than as individuals. But, as the Supreme Court has rightly found, the 556 tribes are not fungible, *Duro v. Reina*, 495 U.S. 676, 695 (1990), and neither are individual Indians, who should be assumed to be no less desirous or deserving of protection for their individual rights than any other citizen of the United States.

As the Court has stated:

> [I]t is the individual who is entitled to judicial protection against classifications based upon his race or ethnic background because such distinctions impinge upon his personal rights, rather than the individual only because of his membership in a particular group. . . .

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

Because they are citizens of this country, Indians, in theory, have the opportunity equal to all other citizens and many resident aliens to work their way out of the difficulties in which many of them live. It is up to them as individuals to put this theory into practice. But, Morris submits, the

disability, the odium, of racial classification by the federal government and Congress has had the very adverse effects the Supreme Court has long said our Constitution is meant to protect against. *Adarand*, 515 U.S. at 240-41 (Thomas, J. concurring).

This situation is, in fact, similar to that of indigent criminal defendants, the only group as easily overlooked, perhaps, as nonmember Indian criminal defendants. The Supreme Court recognized that they have fundamental constitutional rights which cannot be ignored simply because of their penury. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In that case the powers of governments were ranged against individuals seeking protection of their rights, whether guilty or not, whether rich or poor. The governments offered intricate legal arguments and what they saw as compelling practical reasons to allow their practices to continue in a manner convenient to their power but in conflict with individual rights. The Court, of course, came down ultimately on the right side, the side of the individual, the side of the Constitution, as amended and improved to the benefit of individuals through long years of struggle. *See Adarand*, 515 U.S. at 240-41.

By contrast, in the nation-threatening circumstances of World War II, Congress provided for the internment of Japanese-Americans. The Supreme Court then approved this. *See Hirabayashi v. U.S.*, 320 U.S. 81 (1943) and *Korematsu v. U.S.*, 323 U.S. 214 (1944). All now recognize the constitutional violations these acts of Congress represented and enabled. The 1990 Amendments differ in principle from the internment laws at issue during World War II only, but significantly, because here Congress has acted not to address perceived threats to the Nation but a perceived gap in policing "tedious" petty crimes.

While Congress committed another shameful act when it passed the 1990 Amendments, this Court can avoid that stain. It should, not only for the benefit of 4.1 million individual citizens of the United States who are Indians, but to preserve from erosion the progress of this Nation under the lofty principles of equality, even if only for so small a minority.

Respectfully submitted,

JON METROPOULOS
(*Counsel of Record*)

Attorney for Petitioners
April 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS LEE A MINOR CHILD, a minor child; ELIZABETH S. MORRIS; ROLAND J. MORRIS, SR., his guardians and natural parents, Plaintiffs-Appellants, v. TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, Defendant-Appellee, UNITED STATES OF AMERICA, Defendant-Intervenor-Appellee	No. 03-35922 DC No. CV 99-0082 DWM AMENDED MEMORANDUM* (Filed Dec. 22, 2005)

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted March 11, 2005
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submission Vacated March 30, 2005
Resubmitted August 23, 2005
Filed August 25, 2005

Memorandum Withdrawn December ___, 2005

Before: FERNANDEZ, TASHIMA, and GOULD, Circuit Judges.

Thomas Lee Morris appeals the district court's grant of summary judgment in favor of defendant, Judge Winona Tanner, and defendant-intervenor, United States. For the past six years, Morris has had criminal speeding charges pending against him in the tribal court of the Confederated Salish and Kootenai Tribes ("CSKT") in Montana. Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, but is not a member of the CSKT. He challenges the jurisdiction of the tribal court. The district court granted summary judgement against Morris. *Morris v. Tanner,* 288 F. Supp. 2d 1133, 1144 (D. Mont. 2003). Morris appealed.

Morris challenges the jurisdiction of the CSKT tribal court, which was confirmed by the 1990 amendments to the Indian Civil Rights Act ("ICRA") to extend to "all Indians" in criminal cases. *See* Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1856, 1892 (1990) (amending 25 U.S.C. § 1301). He contends that the 1990 amendments violate principles of equal protection and due process. In our recent opinion in *Means v. Navajo Nation,* No. 01-17489, 2005 WL 3370585 (9th Cir. Dec. 13, 2005), however, we squarely addressed and rejected both of these challenges to the 1990 amendments to the ICRA.[1] We are

[1] In *Means,* we also held that " 'all Indians' recognized by the 1990 amendments means all of Indian ancestry who are also Indians by political affiliation [*i.e.,* who are enrolled members of a federally

(Continued on following page)

therefore bound by *Means* to reject Morris' challenges as well. The judgment of the district court is therefore

AFFIRMED.

---

recognized tribe], not all who are racially Indians." *Means*, 2005 WL 3370585, at *3.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS LEE A MINOR CHILD, a minor child; et al., Plaintiff-Appellants, V. TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, Defendant-Appellee, UNITED STATES OF AMERICA, Defendant-Intervenor-Appellee	No. 03-35922 DC No. CV-99-0082-DWM **JUDGMENT**

Appeal from the United States District Court for the District of Montana (Missoula).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 12/22/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.,	CV 99-82-M-DWM
Plaintiffs,	ORDER
vs.	(Filed Oct. 28, 2003)
JUDGE TANNER, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	
Defendant,	
and	
UNITED STATES OF AMERICA,	
Intervenor.	

Before the Court are the United States' motion to dismiss and Plaintiff's and Defendant's motions for summary judgment. The State of Montana has filed an amicus curiae brief on behalf of the defendant.

I. Background

Plaintiff Thomas Lee Morris and his parents Elizabeth and Roland challenge the constitutionality of the 1990 amendments to the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301(2), which affirm tribal court jurisdiction

over all Indians, not just Indians who are members of the prosecuting tribe.[1]

Morris is an enrolled member of the Chippewa Tribe from the Leech Lake Reservation in Minnesota. On June 13, 1999, he was cited for speeding near Ronan, Montana, on the Flathead Indian Reservation. Morris was ordered to appear in the Flathead Reservation Tribal Court. The Flathead Reservation is the home of the Confederated Salish and Kootenai Tribes ("CSKT" or the "Tribes"), in which Morris is not enrolled. Morris filed a motion to dismiss the tribal action against him. The motion was denied. He also filed an action for declaratory and injunctive relief in federal court, claiming the Tribes had no jurisdiction over him. The tribal defendants in the federal action filed a motion to dismiss, which was granted by this Court on October 5, 1999. This court's brief order relied on the 1990 Indian Civil Rights Act amendments. Morris appealed to the Ninth Circuit. On July 24, 2001, the Ninth Circuit reversed and remanded.

The Ninth Circuit's Memorandum states that this Court erred in not considering Morris' constitutional arguments regarding the 1990 Indian Civil Rights Act amendments. This Court did not fully consider whether the amendments violated Morris' equal protection rights under the Due Process Clause, and whether they violate the principle of separation of powers. The Ninth Circuit remanded for consideration of these issues, as well as of whether there is a due process claim aside from equal

---

[1] Morris was a minor at the commencement of this lawsuit so his parents appeared as his guardians. He has now reached the age of majority.

protection. The heart of the Ninth Circuit's direction reads "the district court should consider whether the term 'Indian' as used in the 1990 amendments amounts to a political or racial classification." If the classification is racial, the amendments must pass strict scrutiny. If it is political, the amendments are subject to rational basis review. "The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to 'Indians' who are not enrolled in, or otherwise affiliated with, any tribe." The 9th Circuit further directed this court to consider whether the amendments violate the doctrine of separation of powers under its ruling in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001).

Plaintiff's Complaint includes the following counts: Count I (Federal Common Law), that CKST lacks retained inherent sovereign jurisdiction over non-members of the Tribes for criminal prosecution; Count II (Constitutional-Due Process), that the prosecution, whether derived from the amendments or federal common law, violates Morris' right to due process, because the tribal court is not subject to the Bill of Rights; Count III (Constitutional Equal-Protection), that the prosecution violates Morris' equal protection rights because it is based on race distinctions; and Count IV (Separation of Powers), that the amendments are unconstitutional because Congress' affirmation of tribal jurisdiction violates the separation of powers doctrine.

II. Parties' Arguments

A. The United States' Motion to Dismiss

The U.S. entered this case as an Intervenor following the remand from the Ninth Circuit, in order to argue on behalf of the constitutionality of an Act of Congress. The U.S.'s motion to dismiss tracks the questions posed by the Ninth Circuit. In sum, the motion states that the ICRA amendments are reviewed under rational basis, since Indians[2] are a political and not racial classification; there is a rational basis for the law; and therefore, there is no constitutional infirmity.

First, Acts of Congress are presumed constitutional. U.S.'s Mot. to Dismiss Br., 10-11. Acts of Congress relating to Indian affairs are given particular deference. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1979). The U.S. Supreme Court has upheld the constitutionality of Congressional acts that distinguish Indians from other groups. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

Acts singling out Indians are therefore subject to rational review, based on Indians as a political class, rather than strict scrutiny based on Indians as a racial group. U.S.'s Mot. to Dismiss Br., 12; *Antelope*, 430 U.S., at 645-650; *Fisher v. District Court*, 424 U.S. 382, 391 (1976); *Mancari*, 417 U.S. at 555. "Indian" is defined in ICRA as the same as under 18 U.S.C. § 1153, which has been interpreted in common law as membership in or affiliation with a federally recognized tribe. *LaPier v. McCormick*,

---

[2] The term "Indian" is used advisedly in this order. No disrespect is intended toward those who prefer the term Native American. Indian is used here because of the statutory and common law terminology, as well as the self-identification of many members of the CSKT.

986 F.2d 303, 305 (9th Cir. 1992); U.S.'s Mot. to Dismiss Br., 13-14. The ICRA amendments are rationally related to the government's goals of Indian self-governance and law enforcement on the reservations. U.S.'s Mot. to Dismiss Br., 15-16. In addition, so many non-member Indians live on reservations and partake of tribal services that it is rational for the criminal laws to apply to them as well, in a comprehensive scheme of reservation life. U.S.'s Mot. to Dismiss Br., 16.

The United States' second argument is that Morris fails to state a claim because the ICRA amendments do not violate due process. U.S.'s Mot. to Dismiss Br., 17-18. By being a tribal member, one chooses to be subject to ICRA in tribal court, not the Bill of Rights.

The United States' final argument is that the ICRA amendments do not violate separation of powers because Congress had the power, due to its control over federal common law, to enact legislation that contradicted the decision of the Supreme Court. Congress has also always had plenary authority over Indian affairs. U.S.'s Mot. to Dismiss Br., 19.

B. Defendant's Motion for Summary Judgment

The Tribal Defendant, Judge Winona Tanner, has moved for summary judgment. Her argument contains five parts: 1.) the Tribes may prosecute Morris as a function of their retained inherent sovereign powers; 2.) the comprehensive tribal, state, and federal criminal prosecution scheme is consistent with the U.S. Constitution and reflects the unique status of Indian tribes' sovereignty; 3.) the Ninth Circuit has determined Morris' claim is a facial challenge to the statute, and he can not meet the burden

of proving such a claim; 4.) Morris cannot bring an as-applied challenge because he has not exhausted his tribal remedies, it is beyond the scope of federal judicial review of tribal courts, and he has failed to submit his claim to the President for arbitration as required by his tribe's treaty with the U.S.; and 5.) justice in Indian country is best served by this jurisdictional scheme. Def.'s Sum. Judg. Br., 2.

Judge Tanner starts out by clarifying the procedural posture of Morris' claims before this Court, following remand from the Ninth Circuit. The Tribes conclude that Morris' fourth claim, regarding the Tribal Court's inherent jurisdiction over him as a non-member Indian and whether such jurisdiction violates the doctrine of separation of powers, was decided by the Ninth Circuit's opinion in *U.S. v. Enas;* therefore, Morris' claim is moot in this Court. Def.'s Sum. Judg. Br., 5.

The Tribes' substantive arguments are as follows. First, the Tribes possess an inherent sovereign power to prosecute Morris. This power comes from two sources. First, the Tribes retained the power to prosecute by the terms of the Hellgate Treaty. Def.'s Sum. Judg. Br., 6. The Tribes possessed a form of judicial function prior to the Hellgate Treaty, and the Treaty preserved to them their exclusive use and benefit of the Flathead Reservation. Treaties were a grant of rights *from* the Tribes, not an assignment of rights *to* them. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998); *United States v. Winans*, 198 U.S. 371, 380-82 (1905). Therefore, the Tribes never gave up their judicial authority over the Flathead Reservation.

Second, federal law affirms the right of the Tribes to prosecute Indians. Def.'s Sum. Judg. Br., 7. Powers not

explicitly withdrawn from tribes by Congress are retained, unless those powers are withdrawn by implication as a necessary result of the Tribes' dependent status. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999); *United States v. Wheeler*, 435 U.S. 313, 322 (1978). In *Duro v. Reina*, 495 U.S. 676 (1990), the United States Supreme Court held that tribes' sovereign powers did not include the authority to prosecute non-member Indians, while acknowledging that Congress has ultimate authority over Indian affairs. *Duro*, at 698. Congress responded to this decision by passing the 1990 amendments to the Indian Civil Rights Act, finally enacted as P.L. 102-137, 105 Stat. 646 (1991); 25 U.S.C. §§ 1301-1303. With this amendment, Congress chose to "recognize and affirm" tribal misdemeanor prosecutorial authority over "all Indians on their respective reservations." H.R. Conf. Rep. 101-938, 101st Cong. 2d Sess. 132 (1990). Defendant claims that by drafting the law this way, Congress avoided impermissibly delegating prosecutorial power to the Tribes, but rather enabled it. *United States v. Enas*, 255 F.3d 662, 673-75 (9th Cir. 2001). In *Enas*, the Ninth Circuit wrote that the "1990 amendments are therefore appropriately characterized as a recognition and confirmation of the tribes' inherent sovereign criminal jurisdiction over all Indians." *Enas*, at 679. See also *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), cert. granted (Sept. 30, 2003); *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1998). Defendant claims that *Enas* disposes of Morris' first and fourth claims.

Defendant's second major argument is that the tribal prosecution scheme is consistent with the U.S. Constitution. Def.'s Sum. Judg. Br., 9. Defendant argues that Indian law is unique, and due process and equal protection

claims have repeatedly failed in the area of Indian law. Def.'s Sum. Judg. Br., 9. *United States v. Archambault*, 174 F. Supp.2d 1009, 1023 (D. So. Dak. 2001). A keystone to this argument is the holding in *Morton v. Mancari* that "Indian" is a political rather than racial designation. 417 U.S. 535, 552-54 (1974). *See also U.S. v. Antelope*, 430 U.S. 641, 642-50 (1977).

To fall under the jurisdiction of the Confederated Salish and Kootenai tribal court, a defendant must be "an enrolled member of a federally-recognized tribe." Def.'s Sum. Judg. Br., 10; Memo. of Agreement for Retrocession of Criminal Misdemeanor Jurisdiction Between State of Montana, et al., and the Confederated Salish and Kootenai Tribes, 3 ("For purposes of the Agreement an 'Indian' is a person who is an enrolled member of a federally-recognized tribe."). Indian status for federal criminal jurisdiction requires voluntary membership or affiliation with a federally recognized tribe, in addition to an ancestral or racial element. *LaPier v. McCormick*, 986 F.2d 303-305 (9th Cir. 1992); *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974); *United States v. Rogers*, 45 U.S. 567 (1845). Therefore, an individual's subjection to tribal criminal jurisdiction is voluntary, because one can give up one's tribal enrollment; one cannot relinquish one's race.

Further, tribes themselves are not constrained by the Bill of Rights in the same fashion as other sovereign bodies in the United States. Def.'s Sum. Judg. Br., 11; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The Indian Civil Rights Act was passed to impose most of the constraints of the Bill of Rights on tribes, with a few exceptions. Def.'s Sum. Judg. Br., 11.

The CSKT have also enacted a federally-approved tribal code, thereby providing sufficient protection to the rights of defendants brought before the tribal court. Def.'s Sum. Judg. Br., 12. In addition, the State of Montana, which did have concurrent jurisdiction over reservation misdemeanors under Public Law 280, retroceded this jurisdiction to the tribes in 1994, returning to the CSKT the authority to prosecute member and non-member Indians on the Reservation for traffic violations such as Morris'. Def.'s Sum. Judg. Br., 13. The Memorandum of Agreement for Retrocession between Montana and the CSKT evinces a clear intent to distribute the law enforcement and judicial duties among the three sovereigns. Def.'s Sum. Judg. Br., 13. The United States Bureau of Indian Affairs accepted this Retrocession. 60 Fed.Reg. 33318 (June 27, 1995).

Tanner's third major argument is that the Ninth Circuit Court of Appeals construed Morris' challenge as a facial challenge to the 1990 amendments, and that Morris cannot carry the burden that challenge imposes. Br., 14. The Ninth Circuit concluded that Morris was not challenging his particular prosecution in the CSKT court, but rather the constitutionality of the 1990 amendments altogether.[3] A facial challenge to an act requires a litigant to prove there would be no set of circumstances under which the Act is valid. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); Br., 14. Tanner then argues that if the amendment is constitutionally sound as applied to Morris, then he is not permitted to argue that it might not apply constitutionally to another litigant. *Broadrick v. Oklahoma*, 413

[3] The specific question of Morris' prosecution by CSKT was the basis for this Court's October 5, 1999 dismissal order.

U.S. 601, 610 (1973); Br., 14. Tanner argues that this point dispenses with Morris' second and third claims, because Morris' prosecution does not violate his due process and equal protection rights under the Fifth Amendment. Br., 15.

Tanner's fourth major point is that Morris' claim cannot go forward as an as-applied challenge, because his prosecution has been stayed in tribal court pending this suit over the constitutionality of the amendments. His tribal action has not been fully adjudicated so his claims there are not exhausted. Federal review is inappropriate. Def.'s Sum. Judg. Br., 15-16; *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Further, the exclusive route of an as-applied challenge to the ICRA amendments is through a petition for habeas corpus under 25 U.S.C. § 1303. Def.'s Sum. Judg. Br., 17. Tanner argues that Morris could only avoid tribal exhaustion by framing his claim as a facial challenge. Def.'s Sum. Judg. Br., 17; *Morris v. Tanner*, 99-36007, slip op. at 6 (9th Cir. (Mont.) Aug. 15, 2001.) Third, the Chippewa Tribe's Treaty with the U.S. requires that the tribe and its members (of which Morris is one) "submit all difficulties between them and other Indians to the President and to abide by his decision in regard to the same . . . " Def.'s Sum. Judg. Br., 18; 1855 Treaty with the Chippewa, Art. 9., 10 Stat. 1165 (Feb. 22, 1885), 1855 WL 5610 (Trty).

Tanner's final argument is that the current jurisdictional scheme, allowing tribal jurisdiction over non-member Indians, is in the best interest of public health and safety in Indian Country. This conclusion was the basis of Congress' *Duro* Fix, in order to avoid a prosecutorial void over these

Indians on reservations such as the Flathead. H.R. Rep. No. 61, 102nd Cong., 1st Sess., 372-73 (1991); Def.'s Sum. Judg. Br., 18. Also, allowing this jurisdiction comports with other safety and welfare programs on the reservation. Def.'s Sum. Judg. Br., 19.

Plaintiff responded to both the United States' motion to dismiss and Tanner's motion for summary judgment in the same brief. Plaintiff has two primary arguments. First, the 1990 ICRA amendments rely on a racial distinction and therefore are unconstitutional on their face. Pl.'s Response Br., 5. Morris claims that his position does not depend on *Morton v. Mancari* being reversed. Pl.'s Response Br., 8 n. 8. " . . . [T]he 1990 amendments, uniquely among federal enactments, impose heavy burdens on nonmember Indians while not imposing similar burdens on nonmember non-Indians, who are similarly situated in relation to Tribes." Pl.'s Response Br., 7. Morris relies on *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), and *Rice v. Cayetano*, 528 U.S. 495 (2000), for elucidation of the strict scrutiny required of all laws distinguishing citizens on the basis of race. Pl.'s Response Br., 7-8. Plaintiff also relies heavily on a law review article that argues that the *Duro* Fix was unconstitutional. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev., 53, 63 (1994); Pl.'s Response Br., 9. Plaintiff also argues that Congress may not violate the Constitutional rights of individual Indians as citizens of the United States, despite whatever authority Congress might have over *tribes*. Pl.'s Response Br., 13.

Plaintiffs' second main argument is just that Tanner failed to address and that the United States has "essentially conceded" Morris' due process claim. Pl.'s Response Br., 14.

C. Plaintiff's motion for summary judgment

Morris has also moved for summary judgment, arguing almost the identical points of his response above. The motion addresses three questions: 1.) do the 1990 Amendments violate Fifth Amendment equal protection guarantees because they are a racial classification; 2.) do they violate Fifth Amendment due process rights because they allow tribes to punish citizens without the protection of the U.S. Constitution; and 3.) do they violate the principle of the separation of powers?[4]

Morris argues that this court's review of the 1990 amendments must be under strict scrutiny, since "Indian" is a racial rather than political designation. The amendments single out a race, non-member Indians, for negative treatment. Pl.'s Response Br., 11. ICRA's definition of Indian is not limited to enrolled members of tribes, but to Indians more generally. "[T]he 1990 amendments rely on the definition of Indian developed by cases under 18 U.S.C. § 1153." Pl.'s Response Br., 12. Morris cites *U.S. v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979), *U.S. v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), and *Ex parte Pero*, 99 F.2d

[4] Morris recognizes in his brief that the United States Court of Appeals for the Ninth Circuit decided this question in its opinion in *United States v. Enas*. 255 F.3d 662 (2001), but retained this question in his brief in order to "preserve their claim."

28, 31 (7th Cir. 1938) for the proposition that enrollment alone does not define Indian for application of § 1153. Morris focuses on the fact that to be an Indian in these terms, one must most likely possess some Indian blood. Therefore it is a racial distinction.

Plaintiff further relies on the U.S. Supreme Court's opinions in *Adarand Constructors, Inc. v. Pena*, *supra*, and *Rice v. Cayetano*, *supra*, to claim that a statute like this one, that relies on racial classifications, must withstand strict scrutiny.

Plaintiff emphasizes the part of *Adarand* that says laws that impose a special burden on members of a minority are particularly abhorrent. Pl.'s Response Br., 15-16. "They are just the type of federal action burdening a distinct, disfavored minority that all the justices in *Adarand* agreed require strict scrutiny. Their effect is most certainly to 'perpetuate a caste system.'" Pl.'s Response Br., 16.

Finally, Plaintiff claims that the ICRA amendments violate the Fifth Amendment right to due process because they subject citizens to criminal prosecution without the protections of the U.S. Constitution. Pl.'s Response Br., 18. Plaintiff relies on *Duro v. Reina* for the idea that tribal punishment is such a violation. Pl.'s Response Br., 18.

IV. Analysis

A. Standard for Summary Judgment

The material facts are not in dispute.[5] Rather, this conflict is over the constitutionality of an Act of Congress. The record includes a number of documents beyond the pleadings. Pursuant to Fed. R. Civ. P. 12(b), the United States' Motion to Dismiss will be treated as a motion for summary judgment. Therefore there are three motions for summary judgment pending before the Court.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party must establish that no genuine issue of material fact exists. A material fact is one that is relevant to an element of a claim or defense, and its materiality is determined by the substantive law governing the claim or defense. *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Once a moving party meets its burden that no genuine issues of material fact exist, the burden shifts to the party opposing summary judgment to show specific material facts which

---

[5] Plaintiff filed a statement of uncontroverted facts that falls far outside the bounds of what is appropriate under Local Rule 56.1 and contains considerable legal argument. Defendants have objected to these facts. Defendants' objections, to the extent they refute legal conclusions, are well-founded. However, the facts underlying this Court's conclusions are not in dispute.

remain at issue. *Kaiser Cement Corp. v. Fischbach & Moore*, 793 F.2d 1100, 1103-1104 (9th Cir. 1986).

B. The Ninth Circuit's Remand

1. Do the ICRA amendments violate Morris' Fifth Amendment equal protection rights?

The Ninth Circuit's direction on remand to this Court orders first that this Court determine whether Indian, as used in the 1990 amendments and ICRA statute, is a political or racial distinction. Plaintiff argues fervently that it is a racial distinction, based on the fact that some form of racial component is an element of the definition of Indian, in addition to membership in a federal tribe. Morris argues that the fact that he, a non-member Indian, is subject to CSKT tribal jurisdiction, and a non-Indian, non-member is not, creates a racially-based distinction in prosecution.

The United States Supreme Court explained in *Morton v. Mancari*, 417 U.S. 535 (1974), that Indian for the purpose of federal legislation is a political rather than racial designation.[6] As the Supreme Court explained in *U.S. v. Antelope*, federal regulation of Indian crimes was "rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed

[6] Plaintiff cites a number of cases or situations in which the conclusion of *Morton v. Mancari* is questioned. See, e.g., Pl.'s Sum. Judg. Br., 16. However, it is not the place of this court to predict the future but rather to abide by the law as it now stands.

as legislation of a '"racial group" consisting of "Indians" . . . '". 430 U.S. at 646 (citation omitted.) *See also U.S. v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996); *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976). The distinction is somewhat confusing, of course, because blood quantum is usually an element of tribal membership. However, in this particular instance, CKST policy prescribes that tribal prosecutions of "Indians" means federally-enrolled Indians. Memo. of Retrocession, 3. Racial appearance as an Indian is not enough, and conversely, there are clearly many CKST members who do not appear racially Indian but who are enrolled members of the tribe.

Further, the voluntary nature of tribal membership, like citizenship, is crucial to keep in mind. While one might be unhappy to relinquish one's tribal membership in order to avoid future prosecution by a tribal court, one could still do so. One could never give up one's race in the same way, and in fact, much of the equal protection law in this country is founded on an aversion to disadvantage based on involuntary, immutable characteristics.

The political versus racial distinction is not intuitively grasped. However, a consideration of the mutual history of Indian tribes and European settlers on this continent illuminates the distinction between the treatment of Indians as a political entity and the treatment of, say, African-Americans as a racial group. Indians were here, with fully functioning governmental and juridical institutions, before their contact with European settlers. As time passed, phases of contact, combat, and conquest resulted in varying degrees of negotiation and power struggle between the Europeans and Indians. This situation is entirely distinct from the situation of Africans who were brought to this country enslaved and deprived of their

governmental structures before arrival. The rhetoric of race relations derived from the history of African-Americans is only partially applicable to the situation of Indians, and to overlook the crucial differences minimizes the great respect owed to the remaining sovereignty of tribes. Indian tribes gave up many of their rights by treaty and reserved much to themselves that would not conflict with the expanding United States. Over time, much of what was reserved has been taken, through Congressional legislation and through legal decisions. However, what was not taken, by law remains. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999).

Plaintiff relies on *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), to bolster his argument that this distinction is racial. *Rice* and *Adarand* are, as Plaintiff argues, useful clarifications of the strict scrutiny applied to laws that make racial distinctions. However, as that is not the case here, they are beside the point.[7]

Further, neither case deals directly with any Indian law questions. The majority in *Rice* had the opportunity to analogize the situation of Hawaiians to Indian law, as the State of Hawaii urged them to, and explicitly chose not to.

---

[7] I conclude that Indian is a political distinction, based on the *Morton v. Mancari* line of cases. However, even were Indians simply a racial group, I conclude that the ICRA amendment would easily pass strict scrutiny. Strict scrutiny of a racial distinction requires that the legislation is a narrowly tailored measure that furthers a compelling governmental interest. *Adarand* at 227. The United States and the tribal governments have compelling interests in the self-governance of the tribes, the public health, safety, and welfare of the reservations, and effective and thorough law enforcement on the reservations. The ICRA amendments are necessary and narrowly tailored to meet those needs.

Rice, 528 U.S. at 518. Any discussion of Indian law in that case is in the form of counterpoint or distinction, as dicta, and is not the holding of the case. *Adarand* is also beside the point. The issue in *Adarand* was what means a government could use to remedy racial discrimination. The issue here is preservation, in accordance with the United States' trust obligation, the independent, quasi-sovereign status of Indian nations.

Since the distinction is political, rather than racial, the 1990 amendments are subject to rational basis review. The record is clear that the law easily passes the test. There are significant numbers of non-members Indians on the Flathead Reservation. U.S. Br., 16 (citing the House Hearing in which the CKST Tribal chair claimed 2000 + nonmember Indians on the Flathead reservation). The law needs to be enforced against them. The state of Montana does not exercise jurisdiction over Indians on the reservation for regulatory actions, such as speeding tickets and DUIs.[8] The tribes have misdemeanor jurisdiction and jurisdiction of these regulatory violations over Indians on the reservation. 25 U.S.C. 1302(7).[9] If this jurisdiction were limited to member Indians, large numbers (perhaps 2000) of residents of the reservation could commit misdemeanor crimes and regulatory violations without any risk of prosecution. The basis of Congress' *Duro* Fix was to

---

[8] The Flathead Reservation is unique in the state of Montana as a P.L. 280 reservation, on which the state was authorized to prosecute felonies. The federal government maintains its exclusive prosecutorial jurisdiction on Montana's other reservations, under the Major Crimes Act. The difference does not matter in this instance; however, the ICRA amendments are intended to apply uniformly across Indian country.

[9] This limitation on tribes is implicit in the law that restricts punishments the tribal courts can impose to one year maximum in jail.

avoid a jurisdictional prosecutorial void over these Indians on reservations such as the Flathead. H.R. Rpt. 102-61, 3-4 (1991); S. Rpt. 102-168, 1, 3; S. Rpt. 102-153, 7 (1991); U.S. Br., 15-16, 18.

In addition, non-members Indians have access to BIA health and social services on the reservation, and the CKST must dispense these services to CKST and other non-CSKT tribal members "fair[ly] and uniform[ly]." 25 U.S.C. § 450j(h). Nonmembers also receive police and fire services while on the Reservation and other benefits of tribal government. Therefore, the benefits they receive by living on Flathead are counterbalanced by the burden of submitting to CKST tribal jurisdiction. Further, all tribes benefit by the United States' expressed desire and policy to further self-governance and uphold its treaty obligations, wherever the tribes' individual members may reside.[10]

2. Is there a due process claim other than equal protection?

The Ninth Circuit also directed this Court to consider whether Morris had a due process claim separate from his equal protection claim. Count II of Morris' complaint appears to be a due process Bill of Rights claim, arguing that the tribal court cannot prosecute a citizen without that citizen having the protection of the Bill of Rights. However, all Indians are also citizens of the United States.

---

[10] The Ninth Circuit also directed this Court to consider "whether the amendments apply to 'Indians' who are not enrolled in, or otherwise affiliated with, any tribe". That question need not be answered to decide the matter at hand, and a consideration of it would be advisory. There would likely be a constitutional problem with such a situation, but it is not at hand here.

Congress, in allowing tribal courts to prosecute Indians and in developing ICRA in the first place, has developed a scheme that respects the quasi-sovereign status of tribes and their inherent authority but also assures individuals of their rights in tribal courts. ICRA contains all of the constitutional measures that protect federal defendants except that one may be tried before a jury of six, and grand jury presentment is not required. 25 U.S.C. § 1302. Further, ICRA does contain a habeas corpus provision that allows defendants in tribal court to petition a federal court in the case of illegal detention by a tribal court. 25 U.S.C. § 1303. The United States Supreme Court determined in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that ICRA may result in Indians being subject to tribal laws that would not be constitutionally sound if passed by a state or federal entity, due to Congress' plenary power over Indian affairs and the unique status of reservation Indians.

In any case, Morris' argument about a Seminole being hauled into another tribe's court for which he did not vote is misleading. Pl.'s Response Br., 13. Non-Indian citizens are called into courts of other states all the time, brought before judges whom they did not elect and subject to laws they may not support. That is what ICRA is for, to provide assurances that individuals will have a mechanism through which to receive protection against unjust prosecution and detention. Morris' situation does differ insofar as a Seminole may never be allowed to vote in a CSKT election, whereas a resident of another state can change

residencies and gain the right to vote.[11] But the mere application of laws by another sovereign is not, in itself, a violation of one's rights. ICRA provides a sufficient floor of rights that protects all Indians of all tribes no matter in which tribal court they find themselves and provides them a mechanism for federal review with complete constitutional protection.

3. Do the ICRA amendments violate the principle of separation of powers?

The Ninth Circuit also directed this Court to determine whether the 1990 amendments violate the principle of separation of powers, considering the Circuit's decision in *U.S. v. Enas.* In *Enas*, the Ninth Circuit concluded, contrary to its earlier decision in *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), that the ICRA amendments were an affirmation of tribal power, and that Congress was authorized to pass the law, because the Supreme Court's opinion rested on federal common law and not the Constitution. *Enas*, 255 F.3d, at 673-74. Congress therefore legally exercised its power in passing the amendments. 255 F.3d at 675. The 8th Circuit reached the same conclusion in *U.S. v. Lara*, 324 F.3d 635 (8th Cir. 2003).

In addition, Supreme Court jurisprudence has consistently held that Congress has plenary authority over Indian affairs. *Mancari v. Morton*, 417 U.S. at 551-52; *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73,

---

[11] Convicted felons often lose their rights to vote permanently, yet are still, of course, subject to the laws established by representatives for whom they are barred from voting.

83-84 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Therefore, this law does not violate the principle of separation of powers.

4. Does the CKST have inherent power to prosecute Morris?

Morris's Claim I concerns the inherent power of the Tribes to prosecute Morris. Morris says that this claim is not before the court anymore because the Ninth Circuit had decided that it was undisputed that the court could not prosecute Morris without the amendments. Pl. Sum. Judg. Br., 5 n.5. However, that is not the conclusion I draw – *Duro* had withdrawn the power, or appeared to, and the amendments reaffirmed its existence. *Enas*, 255 F.3d at 669-71. Indeed, without Congressional action, the state of the law would be as the Supreme Court determined it to be in *Duro*. However, Congressional action revived the law (or the power) as it was before the *Duro* decision. The Tribal Defendants dealt with this claim accurately at page 3 of their Response to Morris' Brief in support of Summary Judgment. Therefore, Defendant will be granted summary judgment on Claim One.

For the foregoing reasons, it is HEREBY ORDERED that the United States' motion to dismiss (dkt #60) is GRANTED, the Defendant's motion for summary judgment (dkt #65) is GRANTED, and the Plaintiff's motion for summary judgment (dkt #53) is DENIED.

The Clerk of Court is directed to enter judgment in favor of the Defendant.

Dated this 28th day of October, 2003.

/s/ Donald W. Molloy
DONALD W. MOLLOY,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

[LOGO]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA – MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.,

Plaintiffs,

V

JUDGE TANNER, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLAT-HEAD RESERVATION,

Defendant,

and

UNITED STATES OF AMER-ICA,

Intervenor.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 28, 2003)

CV-99-82-M-DWM

____ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendant and Intervenor and against Plaintiff in accordance with the attached order.

PATRICK E. DUFFY,
CLERK OF COURT

Dated: October 29, 2003 /s/ M. Nub
By Deputy Clerk

FILED, ENTERED and NOTED CIVIL JUDGMENT BOOK VOLUME 89 PAGE 5084

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH S. MORRIS, gal, THOMAS LEE a minor child by and through his guardian, his natural parents; RONALD J. MORRIS, SR., gal, THOMAS LEE a minor child by and through his guardian, his natural parents,

Plaintiffs-Appellants,

v.

TANNER, Judge, Judge of the CONFEDERATED SALISH and KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,

Defendant-Appellee.

No. 99-36007

D.C. No. CV-99-82-DWM

MEMORANDUM*

(Filed Jul. 24, 2001)

Appeal from the United States District Court
District of Montana
Donald W. Malloy, District Judge, Presiding.

Argued and Submitted on
March 8, 2001 Seattle, Washington

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Plaintiff-appellant Thomas Lee Morris ("Morris"), by and through his guardians and natural parents, Elizabeth S. Morris and Ronald J. Morris, Sr., brings this declaratory and injunctive relief action challenging the constitutionality of the 1990 amendments to the Indian Civil Rights Act ("ICRA") (hereinafter referred to as the "1990 amendments" or the "1990 ICRA amendments").

Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes of the Flathead Reservation (the "Confederated Tribes"). On June 13, 1999, Morris was driving a car near Ronan, Montana, within the territory of the Confederated Tribes, when a Ronan City Police officer cited Morris for speeding and ordered him to appear in the Flathead Reservation Tribal Court ("Tribal Court"). Morris appeared in the Tribal Court, entered a plea of not guilty, and filed a motion to dismiss the complaint against him. His motion was denied by the defendant, Judge Tanner, of the Confederated Tribes.

Morris next filed the present action in federal district court, seeking a declaration that the Confederated Tribes lack criminal jurisdiction over him because he is an Indian who is a member of another tribe (a "non-member Indian"). Morris also seeks an injunction prohibiting the Confederated Tribes from continuing to exercise criminal jurisdiction over him in light of his non-member Indian status.

The district court dismissed Morris's complaint on the ground that the 1990 ICRA amendments permit tribes to exercise criminal jurisdiction over non-member Indians. In so ruling, the district court did not address Morris's

allegations in the complaint that the 1990 amendments violate the equal protection component implicit in the Due Process Clause of the Fifth Amendment, and the principle of separation of powers. Morris timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse.

I.

The District Court Erred In Granting Defendant's Motion to Dismiss Without Addressing the Constitutional Issues Raised in the Complaint

As set forth above, in granting the defendant's motion to dismiss, the district court found only that the 1990 amendments permit the Confederated Tribes to exercise criminal jurisdiction over non-member Indians such as Morris. The district court did not address Morris's assertions in the complaint that the 1990 amendments themselves are constitutionally infirm, because they violate his right to equal protection and the principle of separation of powers.[2]

---

[2] Specifically, Morris's complaint includes four causes of action through which he seeks the following relief: (1) a declaration that the Tribal Court lacks inherent criminal jurisdiction over Morris, a non-member Indian; (2) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to due process; (3) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to equal protection; and (4) a declaration that the 1990 amendments are unconstitutional because they violate the principle of separation of powers. In conjunction with each of these requests for declaratory relief, Morris also seeks an injunction prohibiting the Tribal Court from exercising criminal jurisdiction over him.

The fact that the district court erred in dismissing the complaint without addressing the alleged constitutional violations, however, does not mean that we must reverse the district court's decision granting the defendant's motion to dismiss. Under the law of this circuit, we may "affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record." *Kimes v. Stone*, 84 F.3d 1121, 1126 (1996) (citing *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994)). Thus, we must consider whether the district court's decision dismissing Morris's complaint is otherwise supported by the record. If the record supports the dismissal of Morris's complaint, then the district court's error in failing to address Morris's constitutional claims was harmless.

II.

The District Court's Dismissal of Morris's Complaint Was Not Harmless Error

The defendant suggests two reasons why the district court's decision to dismiss Morris's complaint amounts to harmless error. First, the defendant argues that under the ICRA, Morris may only challenge the constitutionality of the Confederated Tribes' exercise of criminal jurisdiction over him by means of a habeas petition rather than through the present action for declaratory and injunctive relief. Second, the defendant argues that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution. Because both of these arguments lack merit, we find that the district court should have reached the merits of Morris's constitutional claims.

First, Morris may properly challenge the constitutionality of the 1990 amendments in the present suit for declaratory and injunctive relief. The defendant correctly notes that under the ICRA, 25 U.S.C. § 1303, a habeas petition is the "exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67 (1978) (interpreting 25 U.S.C. § 1303 to mean that there is no implied right of action in federal district court for declaratory and injunctive relief under the ICRA). However, Morris's case is framed not as a challenge to the jurisdiction of the tribal court, but rather as a challenge to an act of Congress. As Morris explains, "[t]he issue is not whether Tribes are subject to constitutional limitations and judicial review but whether Congress is."

By framing his argument as a challenge to an act of Congress, Morris avoids the remedial constraints of 25 U.S.C. § 1303. Although *Santa Clara Pueblo* held that under 25 U.S.C. § 1303 there is no implied right of action for declaratory and injunctive relief to enforce the substantive provisions of the ICRA, 436 U.S. at 51-52, 98 S.Ct. 1670, Morris does not bring this suit pursuant to the ICRA. Rather, this suit arises under the court's federal question jurisdiction to review the constitutionality of congressional legislation. *See* 28 U.S.C. § 1331. Therefore, 25 U.S.C. § 1303 does not prevent the district court from reaching the merits of Morris's constitutional claims.

The defendant's second argument – that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution – is similarly unavailing. Under our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001), it is undisputed

that the Confederated Tribes could not presently exercise criminal jurisdiction over Morris, a non-member Indian, in the absence of the 1990 amendments. The 1990 amendments may therefore be characterized as *enabling* the Confederated Tribes's exercise of criminal jurisdiction over Morris. This enabling legislation is subject to constitutional review and must comport with the equal protection component of the Fifth Amendment and the principle of separation of powers. Therefore, because Morris has framed his appeal as an attack on the constitutionality of the 1990 amendments rather than as an attack on the constitutionality of the Confederated Tribes's exercise of criminal jurisdiction, the district court must reach the merits of Morris's constitutional claims.

III.

The Question Whether the 1990 ICRA Amendments Violate the Principles of Equal Protection and Separation of Powers is Remanded to the District Court to Consider in the First Instance

Because the district court dismissed Morris's complaint without addressing the constitutional issues raised therein, we remand this matter to the district court to consider in the first instance whether the complaint adequately states a claim for relief. Thus, the district court must consider the question whether the 1990 ICRA amendments violate the equal protection component of the Fifth Amendment or the principle of separation of powers.

In considering whether the 1990 amendments violate the Fifth Amendment,[3] the district court should consider whether the term "Indian" as used in the 1990 amendments amounts to a political or racial classification. If the district court finds that the classification is racial, it should also consider whether the 1990 amendments satisfy strict scrutiny. If the district court finds that the classification is political, it should also consider whether the 1990 amendments satisfy rational basis review. The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to "Indians" who are not enrolled in, or otherwise affiliated with, any tribe. In connection with these inquiries, the district court may wish to hold a hearing to further develop the factual record.

The district court should consider Morris's claim that the 1990 amendments violate the principle of separation of powers in light of our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001).

IV.

Conclusion

For the reasons set forth above, the district court's decision granting the defendant's motion to dismiss for failure to state a claim is reversed, and the matter is remanded to the district court for further proceedings

[3] It is not clear whether Morris's complaint includes a due process claim that is separate from his equal protection claim. The district court should also consider this issue on remand.

consistent with this disposition. The panel shall retain jurisdiction over this case.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.;	
PlaintiffS,	CV-99-82-M-DWM
vs.	ORDER
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	(Filed Oct. 5, 1999)
Defendants.	

Plaintiff filed this action seeking 1) a declaratory judgment that the Confederated Salish and Kootenai Tribal Court lacks jurisdiction over a criminal complaint filed against him, and 2) an injunction prohibiting the Tribal Court from further proceeding. on the criminal complaint.

Plaintiff is an enrolled member of the Minnesota Chippewa Tribe who resides within the exterior boundaries of the Flathead Indian Reservation. He was issued a speeding citation which is being prosecuted in Tribal Court. He entered an plea of not guilty, and the Tribal Court is currently reviewing his motion to dismiss the charges against him. Pending before this Court is defendant's motion to dismiss. The Tribes' position is well taken.

In 1990, Congress amended the Indian Civil Rights Act to recognize and affirm that Indian tribes' power of self government includes "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians" on their respective reservations. 25 U.S.C. 1301.

The Ninth Circuit has held that "the 1990 amendments must be treated as an affirmative delegation of power" by Congress to Indian tribes. *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 947 (1998). The defendant in *Means* was a non-member Indian who was prosecuted in tribal court in 1997 for criminal behavior which allegedly occurred between 1978 and 1988. In holding that the 1990 amendments could not be applied retroactively to Means' conduct, the court observed "(i)t is clear that if Means' acts had occurred after the 1990 amendments were enacted, the amendments would govern." *Id.*

The language of the statute is clear, and has been interpreted to apply to all post-1990 criminal conduct by non-member Indians on Indian reservations.

Wherefore, IT IS HEREBY ORDERED that defendant's motion to dismiss (docket #6) is GRANTED and this action is DISMISSED.

DATED this 5th day of October, 1999.

/s/ Donald W. Molloy
Donald W. Molloy
United States District
Judge

Jon Metropoulos
GOUGH, SHANAHAN, JOHNSON & WATERMAN
33 South Last Chance Gulch
P.O. Box 1715
Helena, Montana 59624-1715
(406) 442-8560
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.;	
Plaintiff,	Cause No. CV-99-82-M-DWM
vs.	COMPLAINT
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	(Filed Jun 15, 1999)

COMES NOW Plaintiff, Thomas Lee Morris, a minor child, ("Morris") by and through his guardians, his natural parents, Elizabeth S. Morris and Roland J. Morris, Sr. for his complaint against Defendant, Judge Tanner of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, and states as follows:

I. JURISDICTION AND VENUE

1. This Court has federal subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because the complaint raises the federal question of whether the Tribal Court of the Confederated Salish and Kootenai Tribes has jurisdiction over a criminal complaint filed against Plaintiff Morris by the Confederated Salish and Kootenai Tribes ("CSKT"). The Tribal Court of the CSKT has taken jurisdiction over such a matter in which Morris, a non-member of the Tribes, is named as a Defendant, and therefore a case and controversy exists for which Morris seeks injunctive relief and declaratory relief under 28 U.S.C. § 2201.

2. Venue lies in this judicial district and division by virtue of 28 U.S.C. § 1391(b) and Rule 105-3 of the Rules of Procedure for the U.S. District Court for the District of Montana in that the Defendants are residents in the territory within the boundaries of the Missoula Division of the District of Montana.

II. THE PARTIES

3. The Plaintiff, Morris, is a resident of Ronan, Montana, Lake County. He is not a member of the Confederated Salish and Kootenai Tribes. He is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. Morris is a minor of 16 years old.

4. Morris' guardians, Elizabeth S. Morris and Roland J. Morris, Sr. are not members of the Confederated Salish and Kootenai Tribes.

5. The Defendant, Judge Tanner, is an official of the Tribal Court of the Confederated Salish and Kootenai Tribes designated to preside over the criminal complaint

made against Morris. Morris seeks prospective equitable relief against her for acts which are *ultra vires.*

III. STATEMENT OF FACTS

6. The CSKT assert governmental authority over non-member Indians for certain criminal matters, including traffic offenses such as the one of which Morris is accused. Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (hereinafter "CSKT Law and Order Code"), Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46.

7. The CSKT Tribal Court exercises its jurisdiction, derived from the authority of the CSKT, to try and punish non-member Indians for certain criminal offenses, including traffic offenses such as the one of which Morris is accused.

8. The attached criminal complaint against Morris alleges a criminal offense which the CSKT claim they have authority to prosecute in their Court against non-member Indians such as Morris. Exhibit 1.

9. To determine whether to send an alleged traffic offender to Tribal Court or some other court, law enforcement officers on the Flathead Reservation directly ask the alleged defender his or her race. If the response is "Indian" or "Native American" or another designation conveying the same information about the person's race, the alleged offender is required to appear in Tribal Court to either plead guilty or defend themselves. Non-Indians are not sent to Tribal Court for traffic offenses. The determination

of whether or not to send an alleged traffic offender to Tribal Court is made, therefore, based on the race of the alleged offender.

10. On June 13, 1999, Morris was driving his family's vehicle in or near Ronan, Montana. At or near the intersection of Terrace Lake Road and Third Street, just east of Ronan, Morris was stopped – that is, temporarily restrained from liberty, (See CSKT Law and Order Code, Ch. III, Sec. A2, Definition 28), by a member of the Ronan City Police Department, a law enforcement officer as defined by the pertinent provision of the CSKT Law and Order Code, (Ch. III, Sec. A2, Def. 17), for allegedly exceeding the speed limit in that area. When asked by the officer whether he is a tribal member, Morris responded that he is a member of a tribe in Minnesota, to wit, the Leech Lake band of Chippewa. The officer so noted on the Complaint against Morris. (Ex. 1.)

11. Because the CSKT assert jurisdiction for criminal matters over non-member Indians, the officer indicated on the complaint that Morris would be tried in CSKT Court. He was given a notice to appear in the Tribal Court of the Confederated Salish and Kootenai Tribe on June 15, 1999 at 10:00 a.m.

12. Morris did appear at that time in that court. Judge Tanner announced that was the time and place to take a plea from Morris in the matter of *CSKT v. Morris*, number 096A 19204. Ex. 1. Morris asked for a jury trial, pled not guilty, and filed the motion to dismiss for lack of jurisdiction attached hereto as Exhibit 2.

13. The citation requiring Morris to appear in Tribal Court indicates the punishment for his alleged offense, if he is found guilty, will be $100.

14. If Morris is found guilty of the alleged offense, his driving record and his insurance, both in terms of rates and availability, will be adversely affected. Morris' parents pay for his insurance at this time.

IV. COUNTS

COUNT I
(Federal Common Law)

15. Morris realleges and incorporates by reference ¶'s 1-14 above.

16. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over the criminal complaint against Morris because they do not have retained inherent sovereign authority over non-members of the Tribes for criminal purposes under federal common law.

COUNT II
(Constitutional – Due Process)

17. Morris realleges and incorporates by reference ¶'s 1-14 above.

18. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over Morris because the exercise of such authority, whether it derives from amendments made in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) or from federal common law, violates Morris' rights to due process by subjecting him, a citizen of the United States, to criminal prosecution in a tribunal not subject to the Bill of Rights or other constitutional constraints.

COUNT III
(Constitutional – Equal Protection)

19. Morris realleges and incorporates by reference ¶'s 1-14 above.

20. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over Morris because the exercise of such authority, whether it derives from amendments made in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) or from federal common law, violates Morris' rights to equal protection by treating him, because of his race, in a manner that differs from the treatment given other individuals who are not members of a tribe and who are not Indian.

COUNT IV
(Constitutional – Separation of Powers)

21. Morris realleges and incorporates by reference ¶ 's 1-14 above.

22. The amendments Congress enacted in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) are unconstitutional and invalid in so far as they purport to recognize, confirm, or affirm tribal sovereign authority for criminal matters over non-member Indians because they violate the Constitution's central mechanism of separation of powers.

V. REQUEST FOR RELIEF

WHEREFORE, Morris respectfully requests that this Court:

(1) Issue a declaratory judgment pursuant to 28 U.S.C. 2201 that, as a matter of federal common law and constitutional law, Tanner, his colleagues who are Tribal Court Judges, their agents, servants, employees, attorneys, successors in office, and those persons in active concert with them, lack authority to resolve the matters raised in the criminal complaint against Morris because the CSKT lack authority over, and therefore the Tribal Court lacks jurisdiction over, that matter.

(2) Issue a preliminary and a permanent injunction restraining and enjoining Tanner, his colleagues who are Tribal Court Judges, their agents, servants, employees, attorneys, successors in office, and those persons in active concert with them, from asserting or attempting to exercise jurisdiction over the criminal complaint filed in the Tribal Court of the Confederated Salish and Kootenai Tribes against Morris, a non-tribal member, on the grounds that as a matter of federal common law and constitutional law the CSKT lack authority over, and therefore the Tribal Court lacks jurisdiction over, the matter presented in the criminal complaint against Morris.

(3) Grant Plaintiff such further relief as the Court may deem proper.

RESPECTFULLY SUBMITTED this 15th day of June, 1999.

GOUGH, SHANAHAN, JOHNSON
& WATERMAN

/s/Jon Metropoulos
Jon Metropoulos

CERTIFICATE OF SERVICE

I, Shanni K. Schilling, hereby certify that a copy of the foregoing *Complaint* along with a written notice of the commencement of this action and request for waiver of service of a summons was filed and served upon the following by mailing a true and correct copy thereof on this 15th day of June, 1999, addressed as follows.

Judge Tanner
Confederated Salish and Kootenai Tribal Court
Confederated Salish and Kootenai Tribe
P O Box 278
Highway 93 West
Pablo, MT 59855-0278

/s/ Shanni K. Schilling
Shanni K. Schilling

EXHIBIT 1

App. 48

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT

ISSUED BY: CITY OF RONAN POLICE DEPT. 096A 19204

☐ STATE OF MONTANA
☐ CITY OF RONAN
☐ Capitol

VS.

☐ THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☐ CSKT

COURT OF Ronan DEPT. #

COUNTY OF LAKE

LOCATED AT RONAN CITY COURT ROOM CSKT

RONAN Pablo MONTANA ON OR BEFORE

THE 15 DAY OF June 19 99 TO ANSWER THIS CHARGE

ON THIS ____ DAY OF ____ 19 ____ THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Manuel

STREET 221 Round Butte Rd

CITY Ronan STATE MT ZIP 59864

SEX M WT 180 HT 5'10 DATE OF BIRTH MO 12 DAY 9 YEAR 72

D/L NO. H2617K00 D/L STATE MT D/L EXP. YEAR 03

HOME PHONE ____ EMPLOYER ____ BUSINESS PHONE ____

VEHICLE LICENSE NO. 13-8176 LIC. STATE MT EXPIRED YES NO

VEHICLE YEAR ____ VEHICLE COLOR black

VEHICLE MAKE Ford

VEHICLE TYPE ☐ CAR ☐ TRUCK ☐ PICKUP ☐ TRK/TRLR ☐ MOTORCYCLE ☐ OTHER

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING ☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE

☐ Speeding SECTION # 61-8-310

ON THE 13 DAY OF June 19 99 AT 14:10 MILITARY TIME

UNIFORM VIOLATION CODE 5760-3

DOCKET NUMBER

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY Violate Exceeding Reasonable Speed Limit By Speeding 46 mph in a 25 mph zone

(5) $100.00

NAMELY AT (LOCATION) Round Butte Rd 3rd St.

LOCATION CODE R O N A N

RECEIVED $ ____ AS APPEARANCE BOND

IF CHECKED ____ PERSONAL APPEARANCE IN COURT REQUIRED.

☐ B.A. TEST GIVEN ☐ ACCIDENT

RADAR UNIT NO. ____ BADGE NO. 14 DIST NO. ____

SIGNATURE OF OFFICER

EXHIBIT 2

Jon Metropoulos
Gough, Shanahan, Johnson &
Waterman
33 South Last Chance Gulch
P O Box 1715
Helena, MT 59624-1715
(406) 442-8560
Attorney for Defendant

IN THE TRIBAL COURT OF THE
CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION,
PABLO, MONTANA

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v. THOMAS LEE MORRIS, Defendant.	Cause No. _____ **MOTION TO DISMISS**

COMES NOW Thomas Lee Morris, a minor child, ("Morris") by and through his guardians, his natural parents, Elizabeth S. Morris and Roland J. Morris, Sr. and respectfully moves this court to dismiss this criminal complaint against him with prejudice for the following reasons:

1. This Court lacks jurisdiction over Morris because he is a non-member of the Tribe.

2. Morris reserves the right to state other bases for his assertion that this court lacks jurisdiction over him as

the facts of this matter are developed and analyzed against controlling law.

A memorandum of law supporting this motion will be filed within five (5) days of filing this motion pursuant to Rule 14.3 and will explain in more detail the basis for this motion.

This motion is submitted in the interests of justice and not for any improper purpose.

RESPECTFULLY SUBMITTED this 15th day of June, 1999.

Gough, Shanahan, Johnson
& Waterman

/s/ Jon Metropoulos
Jon Metropoulos

CERTIFICATE OF SERVICE

I, Jon Metropoulos, hereby certify that a fax copy of the foregoing *Motion to Dismiss* was submitted in the Trial Court via HAND-DELIVERY and served upon the following by mailing a true and correct copy thereof on this 15th day of June, 1999, addressed as follows.

Clerk of Court of the Confederated
Salish and Kootenai Tribes
P.O. Box 278
Highway 93 West
Pablo, MT, 59855-0278

Confederated Salish and Kootenai
Tribal Prosecutor Rob Hunter,
Chief Legal Counsel,
Confederated Salish and Kootenai Tribes
P O Box 278
Highway 93 West
Pablo, MT 59855-0278

/s/ Jon Metropoulos
Jon Metropoulos

[SEAL] **U.S. Department of Justice**
Criminal Division

Washington, D.C. 20530

April 17, 2001

Honorable Cathy Catterson
Clerk, United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94105

Re: *Morris* v. *Tanner*, No. 99-36007
Argued and Submitted 3/8/01
Rule 28(j) Letter

Dear Ms. Catterson:

Would you kindly bring this letter to the attention of the panel in this case.

In the government's amicus brief in this case, at page 31, we cited to *Nofire* v. *United States*, 164 U.S. 657, 661-662 (1897), for the proposition that a non-Indian by ancestry was an "Indian" for criminal jurisdiction purposes when he was adopted by an Indian tribe. On closer inspection, *Nofire* does not stand for that proposition. *Nofire* involved a special federal statute that granted the Cherokee Nation exclusive jurisdiction over cases where all parties were members of the tribe, including, specifically, adopted members, notwithstanding the existence of federal jurisdiction. See 164 U.S. at 658; *Alberty* v. *United States*, 162 U.S. 499, 502 (1896). The general rule is that a non-Indian cannot, through his adoption by a tribe, define himself as an "Indian" for purposes of determining federal criminal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990), citing *United States* v. *Rogers*, 45 U.S. 567 (1846). Nevertheless, "Indian status for purposes of federal criminal

jurisdiction requires voluntary membership or affiliation with a federally recognized tribe. See *LaPier* v. *McCormick*, 986 F.2d 303, 305 (9th Cir. 1992); *United States* v. *Heath*, 509 F.2d 16, 19 (9th Cir. 1974); see generally S. Rep. 102-168, 102nd Cong., 1st Sess. App. C, pp. 48-54 (1991) (legislative history of 1990 ICRA amendment). For equal protection purposes, this makes Congress' classification of "Indians" for federal criminal jurisdiction purposes one based on political affiliation with a tribe, not one based on race. See *United States* v. *Antelope*, 430 U.S. 641, 645-650 (1977).

In the 2000 Census, 4,119,301 persons identified themselves as being at least partly American Indian or Alaska Native. See Census 2000 Brief, Overview of Race and Hispanic Origin, p. 8, Table 6 (U.S. Dept. of Commerce, Economics and Statistics Administration, U.S. Census Bureau March 2001) (copy attached). As of 1999, the total enrollment of the 556 federally recognized tribes (including recognized Alaskan Native groups) was 1,698,483 persons. See 1999 Indian Labor Force Report p. i, (U.S. Department of the Interior, Bureau of Indian Affairs Office of Tribal Services 1999) (copy attached).

Respectfully submitted,

/s/ Richard A. Friedman

Richard A. Friedman
Attorney
U.S. Department of Justice
Criminal Division
Appellate Section
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899
(202) 514-3965

cc: Jon Metropoulos, Esq.
Joseph P. Hovenkotter, Esq.

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT — ISSUED BY: FLATHEAD TRIBAL POLICE DEPT. — T03A107038

STATE OF MONTANA
CITY OF _____ vs.
CS + KT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE 10:00 AM/PM

THE 6 DAY OF April 04

TO ANSWER THIS CHARGE

SIGNED THIS _____ DAY OF _____

THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Morris
STREET 221 Round Butte Rd
CITY Ronan STATE MT ZIP 59864
SEX M WT. 260 HT. 5'10" EYES Brn HAIR Brn DATE OF BIRTH NO. 17 DAY 19 YEAR 92
DR. NO. 12025198241119 DR. STATE MT DR. EXP. YEAR 2011
HOME PHONE 676-7402 EMPLOYER Wal Mart BUSINESS PHONE 883-6201

VEHICLE LICENSE NO. 15-F453 LIC. STATE MT NO. 6 YR. 04
VEHICLE MAKE SUBA VEHICLE YR. 1997 VEHICLE COLOR GLD
VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRACTOR/TRAILER ☐ MOTORCYCLE ☐ OV ☐ _____ ☐ OVH

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-6-302 (JAIL)

ON THE 17 DAY OF March 04 AT 2302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Operated the above named vehicle with a Bac above .08 as shown in affidavit.
- 61-6-302 Tribal Code -

NAMELY AT (LOCATION) Valley View Rd
LOCATION CODE Ronan
IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☐ BA TEST GIVEN ☐ ACCIDENT
EMP. ID. NO. T3-16
RADAR UNIT NO. _____ DETACH NO. _____
SIGNATURE OF OFFICER

RECEIVED
$ NONE
AS APPEARANCE BOND

DOCKET NUMBER

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT — ISSUED BY: FLATHEAD TRIBAL POLICE DEPT. — T03A107039

STATE OF MONTANA
CITY OF _____ vs.
CS + KT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE 10:00 AM/PM

THE 6 DAY OF April 04

TO ANSWER THIS CHARGE

SIGNED THIS _____ DAY OF _____

THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Morris
STREET 221 Round Butte Rd
CITY Ronan STATE MT ZIP 59864
SEX M WT. 260 HT. 5'10" EYES Brn HAIR Brn DATE OF BIRTH NO. 17 DAY 19 YEAR 92
DR. NO. 12025198241119 DR. STATE MT DR. EXP. YEAR 2011
HOME PHONE 676-7402 EMPLOYER Wal Mart BUSINESS PHONE 883-6201

VEHICLE LICENSE NO. 15-F453 LIC. STATE MT NO. 6 YR. 04
VEHICLE MAKE SUBA VEHICLE YR. 1997 VEHICLE COLOR GLD
VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRACTOR/TRAILER ☐ MOTORCYCLE ☐ OV ☐ _____ ☐ OVH

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-6-302

ON THE 17 DAY OF March 04 AT 2302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Operated the above named vehicle in a careless manner driving in an aggressive.
- Careless driving -

NAMELY AT (LOCATION) Valley View Rd
LOCATION CODE Ronan
IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☒ BA TEST GIVEN ☐ ACCIDENT
EMP. ID. NO. T3-16
RADAR UNIT NO. _____ DETACH NO. _____
SIGNATURE OF OFFICER

RECEIVED
$ NONE
AS APPEARANCE BOND

DOCKET NUMBER

112

App. 54

EFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT

ISSUED BY FLATHEAD TRIBAL POLICE DEPT. T03A107040

☐ STATE OF MONTANA
☐ CITY OF _____) vs
☒ CSKT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE Mon AM/PM

THE 18 DAY OF April 04
TO ANSWER THIS CHARGE

ON THIS _____ DAY OF _____
THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH WORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas | MIDDLE Lee | LAST Mott

STREET 221 Round Butte Rd | VEHICLE LICENSE NO. 15-F453

CITY Pablo | STATE MT | ZIP 59864 | LIC. STATE MT | MO. 6 | YR. 04

SEX	WT.	HT.	EYES	HAIR	DATE OF BIRTH	MO.	DAY	YEAR	VEHICLE MAKE
M	200	5'11	BRO	BLK		12	19	67	SUBA

DR. NO. 170251982419 | DR. STATE MT | DR. EXP. YEAR 2011 | VEHICLE YR. 1987 | VEHICLE COLOR GLD

HOME PHONE 676-2402 | EMPLOYER Wal Mart | BUSINESS PHONE 883-6701

VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRK/TRLR ☐ MOTORCYCLE ☐ CV ☐ _____ ☐ OVH

UNIFORM VIOLATION CODE | DOCKET NUMBER

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-13-103

ON THE 17 DAY OF March 04 AT 1302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Failed to wear seat belt while driving the same motor vehicle.
- Seatbelt Violation -

NAMELY AT (LOCATION) Valley View Rd

LOCATION CODE 72015

IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED.
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☐ BA TEST GIVEN
☐ ACCIDENT

RADAR UNIT NO. _____ EMP. ID. NO. TJ-16 DETACH NO. _____

RECEIVED
$ NONE
AS APPEARANCE BOND

SIGNATURE OF OFFICER

App. 55

113

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS, Petitioner-Appellant, v. NAVAJO NATION, a federally recognized Indian Tribe; et al., Respondents-Appellees.	No. 01-17489 D.C. No. CV-99-01057-EHC District of Arizona, Phoenix ORDER (Filed Mar. 22, 2006)

Before: KLEINFELD and RAWLINSON, Circuit Judges, and QUACKENBUSH, District Judge.*

Judges Kleinfeld and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Quackenbush has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

* The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

432 F.3d 924

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS,

Petitioner-Appellant,

v.

NAVAJO NATION, a federally recognized Indian Tribe; RAY GILMORE, Judge of the Judicial district of Chinle, Navajo Nation, Arizona; ROBERT YAZZIE, Chief Justice of the Navajo Nation,

Respondents-Appellees,

and

United States of America,

Respondent-Intervenor-Appellee.

No. 01-17489

D.C. No.
CV-99-01057-EHC

ORDER AND OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted October 10, 2002
Submission withdrawn November 19, 2003

Resubmitted January 28, 2005*
San Francisco, California
Filed December 13, 2005.

Before: Andrew J. Kleinfeld, Johnnie B. Rawlinson, Circuit Judges, and Justin L. Quackenbush,** District Judge.

Opinion by Judge Kleinfeld

COUNSEL

John Trebon, Trebon & Fine, P.C., Flagstaff, Arizona, for the appellant.

Donovan D. Brown, Sr., Acting Deputy Assistant Attorney General, Navajo Nation Office of the Attorney General, Window Rock, Arizona, for the appellees.

Thomas L. Sansonetti (briefed), Assistant Attorney General, U.S. Department of Justice, Env. & Nat. Resources Division, Washington, DC, for the intervenor.

---

* We withdrew submission of this case when the Supreme Court granted certiorari in *United States v. Lara*, 324 F.3d 635 (8th Cir.), *cert. granted*, 539 U.S. 987 (2003), *rev'd*, 541 U.S. 493 (2004), because *Lara* appeared likely to resolve many of the important and difficult issues presented in this case. *Lara* was decided April 19, 2004, but on June 10, 2004, the United States advised the court that because this case challenged the constitutionality of a federal statute, the United States was entitled to intervene. *See* 28 U.S.C. § 2403(a); Fed. R. App. P. 44. The United States filed a motion to intervene as of right on September 2, 2004. We granted the United States' motion, and the court subsequently received further briefing by the intervenor, the parties, and amicus curiae.

** The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

Jon Metropoulos (briefed), Gough, Shanahan, Johnson & Waterman, Helena, Montana, for amicus curiae Thomas Lee Morris and Elizabeth S. Morris

---

ORDER

The opinion filed August 23, 2005, and appearing at 420 F.3d 1037 (9th Cir. 2005), is withdrawn. Pursuant to General Order 5.3.a, an opinion is filed contemporaneously with this order. With the withdrawal and substitution of the opinion, the petitions for rehearing and rehearing en banc are denied as moot. Subsequent petitions for rehearing and rehearing en banc may be filed. Federal Rule of Appellate Procedure 40 now controls.

OPINION

KLEINFELD, Circuit Judge:

This case concerns whether an Indian tribe can exercise criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe.

Facts

This is an appeal from a denial of a petition for a writ of habeas corpus. The petitioner, Russell Means, an enrolled member of the Oglala-Sioux Indian Tribe, seeks to prevent the Navajo Nation from criminally prosecuting him in Navajo tribal court for an incident that occurred on the Navajo Reservation.

In December 1997, Means allegedly threatened and battered his then father-in-law, who is an Omaha Indian,

and allegedly threatened another man, a Navajo Indian. The offenses are misdemeanors under the Navajo Code, with potential maximum penalties of 90 days in jail and a $250 fine for each threat,[1] and 180 days in jail and a $500 fine for the battery.[2]

Means moved in the Navajo tribal court to dismiss the tribal proceedings. He argued that the tribal court had no jurisdiction over him because he was not a Navajo. Means testified that he is an enrolled member of the Oglala-Sioux Tribe of Indians and a permanent resident of Porcupine, a town in South Dakota on the Pine Ridge Sioux Indian Reservation. Means lived on the Navajo Indian Reservation from 1987 to 1997 when he was married to a woman who was a half-Navajo, half-Omaha Indian. Means moved back to the Sioux reservation in 1997, and the alleged offenses occurred later when Means was visiting the Navajo reservation.

Means testified that the difference between an Oglala-Sioux and a Navajo is analogous to the difference in nationalities between an American and a French person. Although Means lived on the Navajo reservation for a decade while married to his ex-wife, he could never become a member of the Navajo tribe because membership required at least one quarter Navajo blood.[3] Means does not speak Navajo, and as a non-Navajo, he had difficulty

---

[1] *See* Navajo Nation Code tit. 17, § 310.

[2] *See* Navajo Nation Code tit. 17, § 316.

[3] Enrolled membership in the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood. One may not become a Navajo by adoption or custom, and one cannot become a Navajo if he is an enrolled member of another Indian Nation or Tribe. *See* Navajo Nation Code tit. 1, §§ 701-703.

obtaining employment because of tribal preferences given to Navajos and restrictions that make it difficult for a non-Navajo to find employment, participate in civic life, and license a business.

The Navajo Nation trial court denied Means' motion to dismiss for lack of jurisdiction. Means appealed to the Navajo Nation Supreme Court which also denied his motion. The decision of the Navajo Supreme Court explains that the Navajo reservation covers about 25,000 square miles, making it larger than many U.S. states and foreign countries.[4] Over 9,000 Indians of other tribes live within the Navajo Nation, so domestic violence cases involving non-Navajo Indians arise from time to time. The Navajo Supreme Court explained that the considerable amount of violence arising from alcohol, when combined with the size and ethnic inclusiveness of the reservation, generates a "need to exercise criminal jurisdiction over all who enter the Navajo Nation," not just Navajo Indians. The Navajo Supreme Court decision says that while there are preferences for Navajos in employment and contracting, they are not absolute barriers, and that Means could have qualified for jury service in the Navajo tribal courts had he been registered to vote in Arizona. The Navajo Supreme Court also noted that, because Means had married a Navajo, he was a "hadane," or in-law, during his residence on the reservation, connected by rights and obligations to his wife's clan. As the Navajo Supreme Court notes, however, becoming a "hadane" does not make one a Navajo.

---

[4] The Navajo Reservation is almost three times the size of New Jersey.

After exhausting his remedies in the Navajo courts, Means petitioned the United States District Court for a writ of habeas corpus to enjoin the tribal courts from proceeding further in his case. The district court denied Means's petition, and he appeals.

Analysis

All the questions before us are purely matters of law and arise on appeal of the district court's denial of a writ of habeas corpus under 25 U.S.C. § 1303, so we review de novo.[5]

I. Jurisdiction

Means has exhausted his tribal court remedies regarding jurisdiction, but he has still not been tried for the alleged threats and battery. Nonetheless, Means remains subject to conditions of pretrial release. Means cannot have any contact with his former father-in-law or go within 100 yards of his former father-in-law's home. Means also must appear as ordered by the Navajo trial court or face re-arrest and additional punishment for any failure to appear. The district court therefore concluded that Means was in custody for purposes of habeas jurisdiction under *Justices of Boston Municipal Court v. Lydon*[6] and *Hensley v. Municipal Court*.[7] The parties have not

---

[5] *See McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir. 2002); *Moore v. Nelson*, 270 F.3d 789, 790-92 (9th Cir. 2001).

[6] *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-02 (1984).

[7] *Hensley v. Mun. Court, San Jose-Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 351-52 (1973).

challenged that conclusion before us, and, although we are required to examine jurisdiction *sua sponte*,[8] we agree with the district court. The charges against Means remain pending in the Navajo Nation trial court, and although the Navajo Nation and Means have stipulated to a stay in the trial court until this appeal is decided, the Navajo Nation states that it fully intends to prosecute Means if jurisdiction is resolved in its favor. Accordingly, we have jurisdiction to consider this appeal.

II. The 1990 Amendments to the Indian Civil Rights Act

In *Oliphant v. Suquamish Indian Tribe*,[9] the Supreme Court held that Indian tribes do not possess criminal jurisdiction over non-Indians.[10] In *Oliphant*, the Suquamish Tribe had prosecuted two non-Indians, one for racing down a highway and colliding with a tribal police car, and another for assaulting an officer and resisting arrest.[11] The tribe did not claim that Congress had given it authority to exercise jurisdiction, but rather that the tribe had an inherent sovereign authority to exercise criminal jurisdiction over incidents that occurred on its reservation – an authority that Congress had never taken away.[12] The Supreme Court disagreed and held that, although Indian tribes enjoy some sovereign powers, their "domestic,

---

[8] *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002).

[9] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[10] *Id.* at 194.

[11] *Id.*

[12] *Id.* at 195-96.

dependent"[13] nature distinguishes them from the governments of foreign countries.[14] It also held that citizens of the United States who are not Indians cannot be subjected to Indian tribal sovereignty for criminal purposes.[15]

Following *Oliphant*, the Supreme Court suggested in *United States v. Wheeler*[16] that the inherent sovereignty of a tribe might extend only to its own enrolled members.[17] Then, in *Duro v. Reina*,[18] the Court explicitly held that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[19] *Duro* reasoned that, as American citizens,[20] Indians were entitled not to be subjected to the criminal authority of sovereigns of which they were not and could not become full members.[21]

In 1990 Congress responded to Indian tribes' concerns about the holding in *Duro* by amending[22] the Indian Civil Rights Act[23] to say that the "powers of self-government" of Indian tribes "means the inherent power of Indian tribes,

---

[13] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[14] *Oliphant*, 435 U.S. at 211; *see also United States v. Kagama*, 118 U.S. 375, 379 (1886).

[15] *Oliphant*, 435 U.S. at 212.

[16] *United States v. Wheeler*, 435 U.S. 313 (1978).

[17] *Id.* at 323, 326-29.

[18] *Duro v. Reina*, 495 U.S. 676 (1990).

[19] *Id.* at 679.

[20] *See* Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b).

[21] *Duro*, 495 U.S. at 692-93.

[22] *See* Pub. L. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990).

[23] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303.

hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[24] "All Indians" plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction. It is significant for the equal protection discussion below, however, that the 1990 Amendments do not cover all persons who may be ethnically Indian. In addition to extending tribal criminal jurisdiction to "all" Indians, the 1990 Amendments make it plain that the definition of "Indian" is the same as "Indian" in the Major Crimes Act.[25]

The 1990 Amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[26] The statute referred to, 18 U.S.C. § 1153 (the Major Crimes Act), says it applies to "[a]ny Indian."[27] In *United States v. Antelope*,[28] enrolled Indians prosecuted under the Major Crimes Act argued that they were denied equal protection of the laws, because, had they not been Indians, they would have been prosecuted under more favorable state law. The Court described the federal scheme as one in which "[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." The Court rejected the Equal Protection challenge because "respondents were not subjected to

---

[24] 25 U.S.C. § 1301(2).

[25] 18 U.S.C. § 1153.

[26] 25 U.S.C. § 1301(4).

[27] *See* 18 U.S.C. § 1153(a).

[28] *United States v. Antelope*, 430 U.S. 641 (1977).

federal criminal jurisdiction because they were of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe."[29] The Court pointed out that "federal jurisdiction under the Major Crimes Act does not apply to 'many individuals who are racially to be classified as "Indians."'"[30] The Court noted in dictum that lower courts had held that enrollment was not an "absolute" requirement for federal jurisdiction in some circumstances, but because respondents were enrolled, the Court was "not called upon to decide" whether enrollment was an absolute requirement and "therefore intimate[d] no views on the matter."[31]

Taken together, the 1990 Amendments, the Major Crimes Act, and *Antelope* mean that the criminal jurisdiction of tribes over "all Indians" recognized by the 1990 Amendments means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians. For that reason, subjecting Means to tribal court jurisdiction but not non-Indians, is, as we explain further below, not a racial classification.

Means argues that the 1990 Amendments were outside the powers of Congress because they were an unconstitutional delegation of federal governmental authority and because they went beyond the congressional power authorized under the Indian Commerce[32] and

---

[29] *Id.* At 646.

[30] *Id.* at 646 n.7 (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).

[31] *Id.* at 646-47, n. 7.

[32] U.S. Const. art. I, § 8, cl. 3.

Treaty[33] Clauses. Indian tribes are not bound by the United States Constitution in the exercise of their powers, including their judicial powers,[34] so federal judicial power over nonmembers could not be delegated to them.[35]

Following the 1990 Amendments, Means's theory was tested in other cases. Double jeopardy cases examined whether the statutory language, "recogniz[ing] and affirm[ing]" the power of tribes over nonmember Indians rather than "delegating" it, avoided double jeopardy problems when both a tribe and the federal government punished someone for the same conduct. If the tribe was exercising its inherent sovereign authority, an Indian defendant could be punished in both the tribal court as well as in federal district court under the "dual sovereignty" doctrine.[36] If the tribe was exercising delegated federal power, then the federal government would be punishing the Indian twice for the same conduct, which it could not do under the double jeopardy clause.[37] More broadly, after the Supreme Court in *Duro* had concluded that the tribe had not retained sovereign power over nonmember Indians,[38] the question was whether Congress even had the ability to "recognize" an inherent power.[39]

---

[33] U.S. Const. art. II, § 2, cl. 2.

[34] *See Talton v. Mayes*, 163 U.S. 376, 382-85 (1896).

[35] *See Duro*, 495 U.S. at 686.

[36] *See, e.g., United States v. Lara*, 324 F.3d 635, 636 (8th Cir. 2003) (en banc), *rev'd*, 541 U.S. 193 (2004); *United States v. Enas*, 255 F.3d 662, 675 (9th Cir. 2001) (en banc).

[37] *See Enas*, 255 F.3d at 667.

[38] *See Duro*, 495 U.S. at 679.

[39] *See Enas*, 255 F.3d at 667-75.

These questions raised by Means's statutory argument[40] have, subsequent to the original briefing in this case, been definitively answered by the Supreme Court. *United States v. Lara*[41] holds that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do."[42] As for whether the tribe's exercise of criminal jurisdiction was a delegated power or an inherent sovereign power, the Court held, with certain reservations, that "the Constitution permits tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."[43] Thus, except for the questions reserved in *Lara*,[44] it is settled law that, pursuant to the 1990 amendment to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe's reservation.

III. Equal Protection and Due Process

A. Equal Protection

Lara expressly declined to answer the question of whether the tribal criminal prosecution of a nonmember Indian would violate the Due Process and Equal Protection

---

[40] *Cf. Enas*, 255 F.3d at 665; *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir. 1998), *overruled in part*, *Enas*, 255 F.3d at 675 n.8.

[41] *United States v. Lara*, 541 U.S. 193 (2004).

[42] *Id.* at 200.

[43] *Id.* at 210.

[44] *See id.* at 207-09 (declining to address equal protection and due process challenges to the Indian Civil Rights Act).

guarantees of the Fifth Amendment.[45] Means argues that by recognizing tribal criminal jurisdiction over nonmember Indians, the 1990 Amendments violate the equal protection guarantees of the Fifth Amendment[46] and the Indian Civil Rights Act[47] because they discriminate against him as an Indian, subjecting him to adverse treatment on account of his race.

Means's equal protection argument has real force. He argues that, although the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation.[48] This makes Means's case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[49] As an Oglala-Sioux, Means can

---

[45] *See id.* at 208-09; *see also id.* at 213-14 (Kennedy, J., concurring).

[46] *See* U.S. Const. amend. V.

[47] *See* 25 U.S.C. § 1302(8).

[48] *See Oliphant*, 435 U.S. at 194.

[49] *See Talton*, 163 U.S. at 382-85; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are

(Continued on following page)

never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

Despite the force of Means's argument, we nonetheless conclude that the weight of established law requires us to reject Means's equal protection claim. *Morton v. Mancari*[50] holds (albeit in the distinguishable context of Indian employment preferences by the federal government) that federal statutory recognition of Indian status is "political rather than racial in nature."[51] Means argues that *Mancari* is undermined by *Adarand Constructors, Inc. v. Pena*,[52] but both the Supreme Court and our court have continued to rely on *Mancari*,[53] and we are bound to follow it under the doctrine of *Agostini v. Felton*.[54]

Mancari held that an employment preference for Indians in the Bureau of Indian Affairs was not "invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment"[55] because "it is not even a

---

imposed. They are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978).

[50] *Morton v. Mancari*, 417 U.S. 535 (1974).

[51] *Id.* at 553 n.24.

[52] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1147-48 (2005).

[53] *See Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004).

[54] *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

[55] *Mancari*, 417 U.S. at 551.

'racial' preference."[56] "[L]egislation that singles out Indians for particular and special treatment" is in a special category because of the historical relationship of the United States with the Indians and the Indian Commerce Clause,[57] and "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[58] The preference at issue passed this "rational tie" standard, because it was "reasonable and rationally designed to further Indian self-government."[59]

We conclude that a law subjecting nonmember Indians to tribal criminal jurisdiction in "Indian country" passes the "rational tie" standard of *Mancari*. First, recognizing criminal jurisdiction of tribal courts over nonmember Indians furthers Indian self-government. The Navajo reservation, larger than many states and countries, has to be able to maintain order within its boundaries. The 1990 Amendments to the Indian Civil Rights Act were meant to protect Indians and others who reside in or visit Indian country against lawlessness by nonmember Indians who might not otherwise be subject to any criminal jurisdiction. As the Navajo Supreme Court notes, there are a significant number of Indians who are not Navajos but live on the Navajo reservation because of intermarriage. It is a matter of ordinary experience that many people are not at their best when their marriages break up, so misdemeanor jurisdiction over nonmember Indians is rationally related to Indian self-government in an area where

---

[56] *Id.* at 553.

[57] *See id.* at 551-55.

[58] *Id.* at 555.

[59] *Id.*

rapid and effective tribal responses may be needed. The Navajo Nation has a sophisticated body of published laws, and an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year. If Means was not subject to prosecution in the Navajo courts, he could not be prosecuted in any court. The state of Arizona, like the majority of states, does not have jurisdiction to try Indians for offenses committed on a reservation,[60] and there is no federal court jurisdiction because Means's alleged offenses do not fall within the Major Crimes Act.[61]

Second, the reason Congress can recognize the power of a tribe to exercise criminal jurisdiction over a nonmember Indian like Means – but not over a nonmember, non-Indian who like Means might become involved in a domestic dispute – is the same reason given by the Supreme Court for the employment preference in *Mancari*: Indian tribal identity is political rather than racial, and the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians.

In *United States v. Antelope*, Indians who were enrolled members of the Coeur d'Alene Tribe challenged the applicability of federal law to a prosecution for a murder that had taken place on the tribe's reservation.[62] Had they been of a different race, they argued, a more favorable provision of state law would have applied under the

---

[60] *See, e.g., Application of Denetclaw*, 320 P.2d 697, 698-701 (1958).

[61] *See* 18 U.S.C. § 1153.

[62] *Antelope*, 430 U.S. at 642-44.

Assimilative Crimes Act,[63] rather than the less favorable federal provision that applied under the Major Crimes Act.[64] But the Supreme Court noted its holding in *Mancari* that the employment preference was granted to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities,"[65] and extended *Mancari* even though the context did not involve Indian self-government. The Court found that the respondents were subjected to federal law "not because they are of the Indian race but because they are enrolled members of the Coeur d'Alene tribe."[66]

There is no sound distinction in principle between *Antelope* and this case. The statute subjects Means to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe.[67] We need not decide whether the same principle would apply if he had been expelled from or had voluntarily and formally withdrawn from his tribe[68]

---

[63] 18 U.S.C. § 13; *see United States v. McBratney*, 104 U.S. 621, 621-24 (1881).

[64] 18 U.S.C. § 1153.

[65] *Antelope*, 430 U.S. at 645 (quoting *Mancari*, 417 U.S. at 554).

[66] *Antelope*, 430 U.S. at 646.

[67] 25 U.S.C. § 1301(2); *see Antelope*, 430 U.S. at 646.

[68] The authorities suggest that members of Indian tribes can renounce their membership. *See Felix S. Cohen's Handbook of Federal Indian Law* 22 (1982 ed.) ("Tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. A member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses, although such termination will not lightly be inferred."); *see, e.g., Smith v. Bonifer*, 154 F. 883, 886 (C.C.D. Or. 1907) (No. 2,683), *aff'd*, 116 F. 846 (9th Cir. 1909); *United States ex rel. Standing Bear v.*

(Continued on following page)

prior to committing the alleged misdemeanors because those hypothetical facts are not claimed in this case. *Morton v. Mancari* suggests that Indians "emancipated from tribal relations" or whose tribes have been terminated are not subject to the Major Crimes Act even if they are "racially to be classified as 'Indians.'"[69]

Our court is among the lower courts that have gone where the Supreme Court did not in *Antelope*, holding that formal enrollment in a tribe is not an "absolute" requirement for Indian status even though it is the "common evidentiary means of establishing Indian status."[70] *United States v. Bruce*[71] was a federal prosecution under 25 U.S.C. § 1152 (the Indian General Crimes Act) for assault on a child on an Indian reservation. The defendant in *Bruce* argued that she was an Indian, so she was entitled to the benefit of the exception in that statute for crimes committed by an Indian against an Indian. She was not enrolled in any tribe nor was she eligible for enrollment. We held (over a strong dissent) that she was nevertheless entitled to the benefit of the Indian exception because her mother's enrollment, two of her three children's enrollment, and other evidence of affiliation with the tribe demonstrated "'a sufficient non-racial link to a formerly sovereign people'"[72] to make her an "Indian" for purposes of the exception.

Crook, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891); *Thompson v. County of Franklin* 180 F.R.D. 216, 225 (N.D.N.Y. 1998).

[69] *Morton*, 430 U.S. at 646-47, n. 7.

[70] *United States v. Bruce*, 394 F.3d 1215, 1224. (9th Cir.2005).

[71] *Id.*

[72] *Id.* at 1224 (quoting *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988)).

Means's case is distinguishable from *Bruce*, most especially by his tribal enrollment. We therefore can and do leave for another day the challenging question *Bruce* invites: whether a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe, would be subject to tribal court jurisdiction. While *Bruce* was a federal prosecution which would have implicitly limited tribal sovereignty if the Indian exception did not apply, this case is a tribal court prosecution. Means has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial. *Bruce* concluded, as we do, that "Tribal courts may . . . prosecute misdemeanors against Indians who are not members of that tribe."[73]

B. Due Process

Because the criminal proceedings against Means in the Navajo trial court have been stayed pending the outcome of his jurisdictional challenge, an "as applied" due process challenge to the Navajo trial proceedings would be premature.[74] Means's facial due process challenge to the 1990 Amendments has no force. Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers,[75] the Indian Civil Rights Act confers all the criminal protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed

---

[73] *Id.* at 1220.

[74] *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

[75] *See Talton*, 163 U.S. at 382-85.

counsel if he cannot afford an attorney.[76] The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor.[77] The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction.[78] Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

IV. The Treaty of 1868

The war between the United States and the Navajo Nation, which began in the middle of the U.S. Civil War, ended in 1868 with a treaty[79] signed on behalf of the United States by General William Tecumseh Sherman. Means argues that, under the terms of this treaty, he may not be criminally prosecuted by the Navajo tribe but must be turned over to the federal government for trial.

Means bases his argument on the so-called "bad men" clauses of the 1868 Treaty. Indian tribes warred, not only with the federal government, but also with other tribes. Guaranteeing that the Indians would return to a peaceful way of life, therefore, required some means of dealing with the hostile foreign tribes.

---

[76] *See* 25 U.S.C. § 1302; *Santa Clara Pueblo*, 436 U.S. at 61; *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988).

[77] *See* U.S. Const. amend. V; *cf.* Fed. R. Crim. P. 7(a)(2).

[78] *See* Navajo Nation Code tit. 1.

[79] Treaty between the United States of America and the Navajo Tribe of Indians, June 1, 1868, U.S.-Navajo, 15 Stat. 667.

One clause in the 1868 Navajo Treaty – which is identical to language used in a number of Indian Treaties of the time – says that

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States.[80]

A second clause, speaking expressly about Indians, is analogous:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws.[81]

Means argues that even if the Navajo Nation at one time possessed the sovereign power to assert criminal jurisdiction over nonmember Indians, it relinquished that right by entering into the 1868 Treaty, which requires that the Navajo Tribe deliver the wrongdoer to the United States, to be tried and punished according to federal, not Indian, law. Means also argues that the 1990 Amendments

---

[80] *Id.*

[81] *Id.*

to the Indian Civil Rights Act cannot abrogate the protections to which he is entitled under the 1868 Treaty because Congress has never expressly abrogated the treaty.

The Navajo Nation, however, argues that a discussion between General Sherman and the Navajo Chief Barboncito during the treaty negotiations expresses an understanding that the Navajo were entitled to "drive out" raiders from the Ute and Apache tribes who might molest them, and that the Indian "bad men" clause therefore meant to confer jurisdiction over nonmember Indians, not to remove it. The Navajo Nation also suggests that we are bound to defer to the understanding of the treaty expressed well over a century after its adoption by the Navajo Nation Supreme Court. That court found that the 1868 Treaty provides for criminal jurisdiction over Means because he entered the Navajo Nation, married a Navajo woman, and engaged in business and civic activities while residing on the reservation.

We accept neither argument because the 1868 Treaty does not conflict with, and is easily reconciled with, the language of the 1990 Amendments to the Indian Civil Rights Act that recognizes the inherent sovereign power of the tribe. A common sense understanding of the treaty language would be that the United States was obligating itself to protect the Navajos from "bad men," of whom the world is never short, and the Navajos were obligating themselves to turn the "bad men" over to the United States when appropriate under the specified conditions.[82] The treaty obligates the United States to arrest and

---

[82] *Cf. Tsosie v. United States*, 825 F.2d 393, 400-02 (Fed. Cir. 1987); *Hebah v. United States*, 428 F.2d 1334, 1338-40 (1970).

punish offenders against the Navajo, under federal law, but it does not say that the Navajo cannot do so on their own, and there is nothing in the treaty language inconsistent with the concurrent jurisdiction that we have recognized in other contexts.[83]

The remedies provided for by the 1868 treaty do not purport to be exclusive. Under the treaty, Indian offenders are to be delivered to the United States for prosecution under federal law on request. This provision, however, is conditioned on a request from the United States's agent. The treaty conditions have not been fulfilled in this case, so the rendition provision in the treaty does not apply. The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do.

Conclusion

The Navajo Nation is empowered, under the 1990 Amendments, to prosecute and punish Indians for crimes even though they are not members of the tribe. The denial of Means's petition for a writ of habeas corpus is

AFFIRMED.

---

[83] *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 595-98 (9th Cir. 1983); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685-86 (9th Cir. 1969); *see also Williams v. Lee*, 358 U.S. 217, 221-22 (1959).

(3)

No. 05-1285

FILED
JUN 9 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

Petitioners,

vs.

TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, and
UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT CONFEDERATED SALISH AND KOOTENAI TRIBES BRIEF IN OPPOSITION

JOSEPH P. HOVENKOTTER
Tribal Legal Department
Confederated Salish and Kootenai Tribes
P.O. Box 278
51383 Highway 93 North
Pablo, MT 59855-0278
(406) 675-2700; (406) 675-4665 (Fax)

Counsel for Respondent Confederated Salish and Kootenai Tribes

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Respondent Confederated Salish and Kootenai Tribes restate the issue before this Court as follows: Whether the Confederated Salish and Kootenai Tribes ("CS&K Tribes") may exercise their inherent authority, as recognized and affirmed by Congress pursuant to 25 U.S.C. §§ 1301-1303, to prosecute a misdemeanor crime committed on the Flathead Indian Reservation by a person who is not an enrolled member of the CS&K Tribes, but who is an enrolled member in another federally-recognized Indian tribe.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	10
I. The Court Should Deny Review Because Tribal Prosecution of the Petitioner Does Not Violate the Equal Protection Component of the Fifth Amendment	10
II. The Court Should Also Deny Review Because Tribal Prosecution of the Petitioner Does Not Violate the Due Process Clause of the Fifth Amendment	13
III. Tribal Criminal Justice Systems, As Developed by Congress and this Court, Are Working To Ensure the Health, Safety and Welfare of All Indian Reservation Residents	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Duro v. Reina, 495 U.S. 676 (1990) 6

Ex Parte Crow Dog, 109 U.S. 556 (1883) 17

Fisher v. District Court, 424 U.S. 382 (1976) 11

Keeble v. U.S., 412 U.S. 205 (1973) 17

Kennerly v. District Court of Ninth J.D. of Montana, 400 U.S. 423 (1971) 9

LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1992) 12

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) 2, 8

Morris v. Tanner, 288 F.Supp.2d 1133 (D.Mont. 2003) 8

Morton v. Mancari, 417 U.S. 535 (1974) 1, 11, 12

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 15, 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 14

State of Montana v. Greenwalt, 663 P.2d 1178 (Mont. 1983) 9

United States v. Errol D. Jr., 292 F.3d 1159 (9th Cir. 2002) 17

United States v. Heath, 509 F.2d 16 (9th Cir. 1974) 12

United States v. Salerno, 481 U.S. 739 (1987) 13

U.S. v. Antelope, 430 U.S. 641 (1977) 1, 11, 12

U.S. v. Armstrong, 517 U.S. 456 (1996) 13

U.S. v. Lara, 541 U.S. 193 (2004) 1, 11, 15, 16

Wayte v. United States, 470 U.S. 598 (1985) 13

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

18 U.S.C. § 13 (Assimilative Crimes Act) 17

18 U.S.C. § 1152 (Indian Major Crimes Act of 1976)..... 17

18 U.S.C. § 1153 (Indian Major Crimes Act of 1976).... 7, 17

25 U.S.C. § 2 (Act of August 8, 1946)..... 15

25 U.S.C. § 476 (Indian Reorganization Act of 1934)..... 4

25 U.S.C. §§ 1301-1303 (Indian Civil Rights Act of 1968) 5

25 U.S.C. § 1323 (Indian Civil Rights Act of 1968) 8

Pub. L. No. 93-280, 67 Stat. 588 (1953)..... 8, 9

FEDERAL REGULATIONS:

25 C.F.R. Part 2 15

60 Fed. Reg. 33318 (1995)..... 4

STATE STATUTES:

Mont. Code Ann. § 2-1-301 8

Mont. Code Ann. § 2-1-306 9

TRIBAL AUTHORITY:

Constitution and Bylaws of the Confederated Salish and Kootenai Art. VI, sec. 1(l)..... 4

Tribal Ordinance 103-A, CSKT Laws Codified, Title II 4

TABLE OF AUTHORITIES – Continued

Page

Tribal Ordinance 103-A, CSKT Laws Codified § 1-2-101 4

Tribal Ordinance 103-A, CSKT Laws Codified § 2-1-1301(a) 4

OTHER AUTHORITY:

Proclamation of the Governor of Montana, September 30, 1994 9

Hearing before the Committee on Interior and Insular Affairs, House of Representatives on H.R. 972 To Make Permanent the Legislative Reinstatement, Following Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990) of the Power of Indian Tribes to Exercise Criminal Jurisdiction over Indians, 102nd Cong., 1st Sess. 11 (1991) (statement of Ronal D. Eden, Office of Tribal Services, U.S. Department of the Interior) 9

Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan.L.Rev. 235 (1994) 13

Hearing before the Select Committee on Indian Affairs, Senate on S. 962 To Make Permanent the Legislative Reinstatement, Following the Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990) of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians, 102nd Cong., 1st Sess. 30-34, Part 1, 155-160 (1991) (testimony of DeAnna Fairbanks, Chief Judge, Minnesota Chippewa Tribal Court) 7

S. Rep. 168, 102nd Cong., 1st Sess. 4 (1991) 12, 18

H.R. Rep. 61, 102nd Cong., 1st Sess. 3-4 (1991) 18

TABLE OF AUTHORITIES – Continued

Page

H.R. Conf. Rep. No. 101-938, pt. 3 (1990) 6

S. Rep. No. 102-153, at 12 (1991) 6

BRIEF IN OPPOSITION

The Respondent Confederated Salish and Kootenai Tribes ("CS&K Tribes") respectfully submit this Brief in Opposition to Petition for Writ of Certiorari filed with this Court on April 6, 2006.

The petition for certiorari should be denied because it presents no issue worthy of this Court's attention. The U.S. Court of Appeals for the Ninth Circuit held that tribal court jurisdiction is proper for prosecution of misdemeanor crimes committed by a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe. The ruling made no new law. To the contrary, the ruling is founded entirely on this Court's decisions in *Morton v. Mancari*, 417 U.S. 535 (1974), *U.S. v. Antelope*, 430 U.S. 641 (1977), and *U.S. v. Lara*, 541 U.S. 193 (2004). By working from such a well-established legal foundation, the court of appeals constructed a ruling that is entirely faithful to this Court's long-standing federal Indian law precedent.

Review should also be denied because there is absolutely no conflict between the federal circuit courts on the question presented. Petitioner concedes this point but seeks to manufacture a conflict regarding the scope of Congress's authority to enact legislation affecting Indians when it acts pursuant to the general Commerce Clause versus when it acts pursuant to the Indian Commerce Clause. Petitioner never raised this issue below and it should be dismissed here as untimely. Further, Petitioner's attempt to manufacture a conflict between the circuit courts is pure conjecture, belied by his failure to offer any supporting law, fact, or research of any kind. Since no

conflict exists on any issue properly raised by Petitioner, review by this Court should be denied.

Finally, the petition for certiorari should be denied because there is nothing novel or extraordinary about this case. This case is about a criminal defendant asserting constitutional challenges of equal protection and due process in an attempt to avoid prosecution of his misdemeanor crimes by an Indian tribal government. Petitioner's assertion that he is raising important unsettled questions of federal law is simply wrong. The court of appeals constructed its ruling through a textbook application of this Court's established precedent regarding the scope of constitutional protection applicable against a tribal government when the tribe exercises its inherent sovereign authority to prosecute criminal acts committed by a non-member Indian on the tribe's reservation. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

The CS&K Tribes do not take issue with the Petitioner's Statement of the Case regarding the procedural background.[1] However, within his statement of the case Petitioner makes misstatements of fact and law, the most significant of which are addressed below.

[1] The CS&K Tribes concur with Petitioner's explanation regarding controlling precedent below to the effect that the Ninth Circuit's decision in this case was dictated by its decision in *Means v. Navajo Nation*, 432 F.3d 924 (2005), Pet. at App. 57-79, and therefore will herein adopt Petitioner's approach for citation to the lower court's opinion via reference to the Ninth Circuit's *Means* opinion.

Petitioner misstates the facts of this case by repeatedly making express and implied assertions that the Congress and Indian tribes are mistreating nonmember Indian people in a way that violates their constitutional rights. Petitioner is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Band, who has come to live in the community of the CS&K Tribes. As a member of the Flathead Reservation community, he is provided with many opportunities and services that the CS&K Tribes make available to all Indians, including, among other things: health services, housing, educational opportunities, job training programs, employment, public transportation, public assistance, and commodities. Most relevant to this case, the CS&K Tribes provide law enforcement services to all residents of the Flathead Reservation. The CS&K Tribal Law & Order Department provides police protection to all residents of the Flathead Reservation. The CS&K Tribal Prosecutor prosecutes misdemeanor criminal charges against all Indian defendants. The CS&K Tribal Defender provides attorney services to Indian defendants.[2] The CS&K Tribal Court adjudicates cases involving all Indian defendants and incorporates social and health services from CS&K Tribal agencies in sentencing. All of these services are provided to individual Indians without distinction for tribal membership.[3]

The CS&K Tribes have developed an integrated contemporary criminal justice system that is consistent with federal law. The CS&K Tribal government, in its

---

[2] App. 1 (Affidavit of James Taylor, Managing Attorney of the CS&K Tribal Defender's Office).

[3] App. 7 (Affidavit of CS&K Tribes Acting Chief Judge Gary L. Acevedo).

present form, was established on October 28, 1935 pursuant to the Indian Reorganization Act of 1934, 48 Stat. 987 (1934), 25 U.S.C. § 476. Pursuant to its federally approved Constitution,[4] the Tribal Council enacted law to govern misdemeanor criminal acts committed by Indians on the Flathead Reservation[5] and vested the judicial power for prosecuting such criminal acts in the CS&K Tribal Court.[6] For traffic offenses, like the Petitioner's, the Tribes have adopted the applicable sections of the Montana Code including exceeding the speed limit.[7] The CS&K Tribal criminal system is implemented consistent with a three government criminal enforcement agreement between the CS&K Tribes, the state of Montana (and its sub-entities), and the United States.[8]

The district court below developed a record that shows the CS&K Tribal government is providing all of the above services to Petitioner in a manner that is consistent with federal law. The court of appeals accepted the district court's factual determination. Petitioner, however, continues to

---

[4] CS&K Tribes' Const. Art. VI, sec. 1(l), App. 18-20.

[5] Tribal Ordinance 36B, September 14, 1982, subsequently amended to be included in Title II of CSKT Laws Codified by Tribal Ordinance 103A, December 9, 1999.

[6] CSKT Laws Codified § 1-2-101.

[7] CSKT Laws Codified § 2-1-1301(a).

[8] *See* Memorandum of Agreement for Retrocession of Criminal Misdemeanor Jurisdiction Between the State of Montana, et al., and the Confederated Salish and Kootenai Tribes, September 30, 1994, ("Law enforcement officers will determine the Indian/non-Indian status of a suspect at the crime scene as soon as reasonable after providing any emergency law enforcement services and securing public safety. For purposes of the Agreement an 'Indian' is a person who is an enrolled member of a federally-recognized tribe.") App. 34; *see also* 60 Fed. Reg. 33318, June 27, 1995.

assert that Congress and Indian tribes treat him, and all nonmember Indians, as individuals who are members of an "overlooked" racial group consisting largely of "homeless" "fringe-dwellers" and enduring socioeconomic conditions "similar to that of indigent criminal defendants" and World War II Japanese-American internees. Pet. at 18-19. The Petitioner's circumstances are nothing like the conditions of the disadvantaged persons he seeks to assert for purposes of his case. He attempts to disguise himself as one of them because his own conditions simply do not provide the factual support he needs to sustain his legal argument. There is no evidence on the record to the contrary. Both courts below fully considered his arguments in light of the facts on the record and rejected them based on the relevant precedent of this Court. Accordingly, there is no judicial error or oversight for this Court to correct.

Petitioner misrepresents the CS&K Tribes' position regarding the scope of the Tribes' criminal jurisdiction by asserting the Tribes' position to be that the 1990 amendments[9] to the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, "swept into the Tribes' criminal jurisdiction Indians who are enrolled members of a tribe and perhaps other racial 'Indians,' but not all Indians." Pet. at 5 ¶ 1. This statement misrepresents the governmental practice of the CS&K Tribes and attempts to interject a racial element into his argument that does not arise from the facts of this case. The CS&K Tribes have consistently exercised criminal jurisdiction based solely on whether a defendant is enrolled in a federally recognized

[9] Pub.L.No. 101-511, 104 Stat. 1856 (1990), made permanent by Pub.L.No. 102-137, 105 Stat. 646 (1991), codified at 25 U.S.C. §§ 1301-1303.

tribe. That has been and continues to be the CS&K Tribes' policy and practice as memorialized in several cooperative agreements between the CS&K Tribes and other federal, state, and local law enforcement agencies.[10] In effectuating this policy, the CS&K Tribes sought evidence regarding whether Petitioner was a member of a federally-recognized tribe in order to determine jurisdiction for prosecution of his misdemeanor criminal charge. The CS&K Tribes never sought nor developed evidence regarding Petitioner's race or ethnicity because such information is not relevant to this case. Accordingly, the petition should be denied because there is no new law in the circuit court's ruling regarding "racial Indians" and neither the Petitioner nor any other person has been redirected to tribal jurisdiction by that ruling.

Petitioner misleads the Court by implication when he states that the 1990 ICRA amendments were initially enacted by Congress "without holding a hearing." Pet. at 9 ¶ 2. Although factually accurate, this implies that Congress never received input from stakeholders prior to enacting legislation in response to this Court's decision in *Duro v. Reina,* 495 U.S. 676 (1990). The implication is misleading. Although Congress acted quickly in response to *Duro*, it took care to incorporate a one-year sunset clause in its legislation and then held extensive hearings prior to enacting permanent legislation.[11] Furthermore, the record of the Senate Select Committee on Indian Affairs is replete with references regarding non-member Indians, including: supporting testimony from Petitioner's

---

[10] *Supra* at footnote 8.

[11] H.R. Conf. Rep. No. 101-938, pt. 3 (1990) 136 Cong. Reg. H13596 (daily ed. Oct. 24, 1990); S. Rep. No. 102-153, at 12 (1991).

tribe,[12] and cautionary testimony from a tribal watchdog public interest group in which Petitioner's father was an officer.[13] The testimony of all of these people addressed the status of non-member Indians. As a result, Congress was well advised of the civil rights of non-member Indians regarding tribal government at the time it enacted the 1990 ICRA amendments. This Court should not be persuaded to provide judicial review to Petitioner based on his misleading statements to the contrary.

Petitioner asserts that this Court's decisions regarding the Indian Major Crimes Act, 18 U.S.C. § 1153, "make it clear that the primary, indispensable and immutable factor for classification as an 'Indian' is racial." Pet. at 9-10. This assertion is conclusory, unsubstantiated, and false. Although there may be a racial element to determinations made under the definition of "Indian" in the Major Crimes Act for federal jurisdiction purposes, that definition is not the law being applied by the CS&K Tribes for determining jurisdiction in this case. The CS&K Tribes are asserting jurisdiction over Morris based on his political status as a member of a federally-recognized Indian tribe, not because of his race. Both the district court and the court of appeals were fully cognizant of the collateral

---

[12] Hearing before the Select Committee on Indian Affairs, Senate on S. 962 To Make Permanent the Legislative Reinstatement, Following the Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990) of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians, 102nd Cong., 1st Sess. 30-34, Part 1, 155-160 (1991) (testimony of DeAnna Fairbanks, Chief Judge, Minnesota Chippewa Tribal Court).

[13] *Id.*, Part 2 at 21-23 (testimony of Fred Hatch, Citizen Equal Rights Alliance); Plaintiff-Appellant below Roland Morris (now deceased) was identified as Secretary of the organization (http://citizensalliance.org/links/pages/frames/who_we_are.html).

issues regarding the Major Crimes Act and took care to first ascertain that Petitioner's Indian status was derived from his membership in a federally-recognized tribe before concluding that he was subject to tribal jurisdiction because of this political status, not because of his race. *Morris v. Tanner*, 288 F.Supp.2d 1133, 1135, 1141-1142 (D.Mont. 2003), Pet. at App. 6 ¶ 1, 19-23; *Means*, 432 F.3d at 927, 933, Pet. at App. 59, 64-66, 73-74. Thereafter, both courts also specifically addressed his assertion that Indian status is "immutable" by noting that tribal membership was a voluntary status that could be renounced. *Morris* at 1141, Pet. at App. 19-20, 22; *Means* at 934, Pet. at App. 73-75. As a result, the Court should deny the petition because it contains no substantiated issues regarding either the Major Crimes Act or "immutable" racial determinations.

Petitioner represents to the Court that he will be "prosecuted in state district court . . . if this Court rules in his favor." Pet. at 13 ¶ 2. He is wrong. The Flathead Reservation is a Public Law 280 ("PL 280"), 67 Stat. 588 (1953), jurisdiction in which partial criminal jurisdiction was retroceded by the Montana legislature to the CS&K Tribes. Congress enacted PL280 to allow concurrent state-tribal criminal jurisdiction in Indian country, then subsequently amended PL 280 to provide for retrocession of state criminal jurisdiction to tribes.[14] The state of Montana assumed PL280 jurisdiction for the Flathead Reservation from the U.S. in 1965,[15] then subsequently retroceded its misdemeanor criminal jurisdiction to the CS&K Tribes in

[14] Pub.L.No. 90-234, Title IV, § 403, April 11, 1968, 82 Stat. 79 (1968), codified at 25 U.S.C. § 1323.

[15] Mont. Code Ann. § 2-1-301.

1994,[16] and thereafter recognized and affirmed exclusive CS&K Tribal jurisdiction over "Indians committing misdemeanor criminal offenses within the external boundaries of the Flathead Indian Reservation."[17] Consequently, state courts do not have jurisdiction over Morris's alleged offense. If federal courts have such jurisdiction, then it is unlikely any federal prosecution will ensue either because the federal system does not have adequate resources to prosecute misdemeanor criminal offenses on the Flathead Reservation.[18] So, if Morris is not prosecuted in the CS&K Tribal court, then he will not be prosecuted in any court. See *State of Montana v. Greenwalt,* 663 P.2d 1178 (Mont. 1983); see also *Kennerly v. District Court of Ninth J.D. of Montana,* 400 U.S. 423, 428-429 (1971). This jurisdictional void is unique to the Flathead Reservation due to its status as a partial PL280 reservation. The record of this case is not well developed regarding the other predominant type of jurisdictional void (discussed below) that would be created throughout Indian country if this Court were to grant review and rule in Petitioner's favor. Accordingly, the petition should be denied because it only addresses questions of unique and limited application.

---

[16] Mont. Code Ann. § 2-1-306.

[17] Proclamation of the Governor of Montana, September 30, 1994, App. 57-58.

[18] Hearing before the Committee on Interior and Insular Affairs, House of Representatives on H.R. 972 To Make Permanent the Legislative Reinstatement, Following Decision of Duro Against Reina (58 U.S.L.W. 4643, May 29, 1990) of the Power of Indian Tribes to Exercise Criminal Jurisdiction over Indians, 102nd Cong., 1st Sess. 11 (1991) (statement of Ronal D. Eden, Office of Tribal Services, U.S. Department of the Interior).

REASONS FOR DENYING THE PETITION

I. The Court Should Deny Review Because Tribal Prosecution of the Petitioner Does Not Violate the Equal Protection Component of the Fifth Amendment

There are only three facts, each simple and straightforward, that are relevant to Petitioner's equal protection claim. First, Petitioner is a member of a federally-recognized Indian tribe. Pet. at App. 41 ¶ 3. Second, he is charged with committing a misdemeanor criminal offense on the Flathead Indian Reservation. Pet. at App. 42 ¶ 8. Third, he is being directed to the CS&K Tribal Court for prosecution of his misdemeanor charge because he is a member of a federally-recognized tribe. Pet. at App. 43, 48. These facts are real, are substantiated by evidence on the record, and are uncontroverted.

Petitioner can not prevail based on these facts, however, so he attempts to present an alternative set of convoluted facts. First, he attempts to disguise himself as either a non-Indian or an ethnic Indian who is not a member of any federally-recognized tribe. Pet. at 15 ¶ 3, 17 ¶ 1. Second, he insinuates that his circumstance is akin to a person charged with a felony crime who could end up "languishing in [a] tribal jail facilit[y]." Pet. at 17 ¶ 1. Third, he insists that he is being directed to the CS&K Tribal Court on the basis of his race, not on the basis of his membership in a federally-recognized tribe. Pet. at 15 ¶ 1, 18-19. These facts are hypothetical, unsubstantiated, and controverted by the record in this case.

This Court should not allow Petitioner to manufacture an equal protection issue where there is none. It would be particularly unjust to do so when, as here, the Petitioner's

allegations are controverted by his own pleadings. In his Complaint, Petitioner admits he is a tribal member. Pet. at App. 41 ¶ 3. He describes the charge against him using the parameters of a misdemeanor offense. Pet at App. 42 ¶ 8, 43 ¶ 13. He admits that he was "asked by the officer whether he is a tribal member" and then responded "that he is a tribal member of a tribe in Minnesota, to wit, the Leech Lake Band of Chippewa." Pet. at App. 43 ¶ 10. The criminal citation affirms these facts by directing Petitioner to CS&K Tribal court because he was a "tribal member from Minn. (Cree)" and identifying the potential penalty as "$100.00". Pet. at App. 48. This evidence alone belies Petitioner's claim that he is being prosecuted in the CS&K Tribal court due to his race and affirms that he is being prosecuted because of his political status as an Indian resulting from being an enrolled member of a federally-recognized tribe. The Court should deny the petition, because there is nothing novel or extraordinary about this case.

There is a major constitutional distinction in the manner in which the federal government deals with Indians. Congress and the courts have created an entire body of law (i.e., Title 25 U.S.C.) dealing with Indians as "Indians". This treatment has led to challenges similar to Petitioner's that legislation differentiating Indians from others violated the due process and equal protection principles of the Fifth Amendment. These challenges have been uniformly rejected by this Court. See *U.S. v. Antelope*, 430 U.S. 641, 642-650 (1977); *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976); *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974); See also *U.S. v. Lara*, 541 U.S. 193, 205 (2004). In *Mancari* this Court rejected the claim of unconstitutional discrimination by ruling that an individual's status

as an "Indian" under federal and tribal law is not racial. The status is not taken by "a 'racial' group consisting of 'Indians', instead, it applies only to members of 'federally recognized tribes.' . . . In this sense, the preference is political rather than racial in nature." *Id.* at 552-554, n. 24; See *Antelope*, 430 U.S. at 646 (1977). Therefore, the petition should be denied because the courts below issued rulings that are entirely faithful to this Court's long-standing federal Indian law precedent.

CS&K Tribal law is consistent with federal law in that it applies political criteria for establishing Indian status for criminal jurisdiction purposes. Indian status for purposes of CS&K Tribal criminal jurisdiction requires that a suspect be "an enrolled member of a federally-recognized tribe."[19] Indian status for purposes of federal criminal jurisdiction requires voluntary membership or affiliation with a federally recognized tribe. See *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1992); *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974); see generally S.Rep. 102-168, 102nd Cong., 1st Sess. App. C, pp. 48-54 (1991). For equal protection purposes, therefore, the classification of "Indian" for determining either Tribal or federal criminal jurisdiction is one based on political affiliation with a tribe, not one based on race. See *Antelope*, 430 U.S. at 645-650. Thus, the petition should be denied because there is no constitutional question regarding equal protection that arises from the facts of this case.

Petitioner's evidentiary burden in this case is substantial because, as he points out, there are 556 federally-recognized tribes, and he must address the enrollment and

---

[19] *Supra* at footnote 8.

judicial practices of each and every one. Pet. at 17 ¶ 2. He must do so because he has raised his challenge to tribal jurisdiction as a facial challenge to a federal statute. "A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). To demonstrate that "no set of circumstances" exists requires proof that each and every statutory application would be unconstitutional.[20] Petitioner only cursorily attempts to meet his evidentiary burden by presenting selected excerpts of the CS&K Tribes enrollment rules, but presents nothing regarding the remaining 555 federally-recognized tribes. Accordingly, the petition should be denied because Petitioner provides little or none of the evidence necessary to sustain his burden for supporting a facial challenge to a federal statute.[21]

II. The Court Should Also Deny Review Because Tribal Prosecution of the Petitioner Does Not Violate the Due Process Clause of the Fifth Amendment.

The Petitioner insists that there is a "compelling" due process question in his case. Pet. at 15 ¶ 2. He also insinuates that tribal courts are unfair tribunals that need the review of this Court together with a larger group of extraconstitutional

---

[20] Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan.L.Rev. 235, 236 (1994).

[21] Even if Petitioner had adduced evidence in support of his equal protection claim, in order for him to prevail he must show that the prosecution has "a discriminatory effect and is motivated by a discriminatory purpose." *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996); quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985).

sovereign powers, including unidentified foreign governments. Pet. at 15 ¶ 2, 16 ¶ 4, 17 ¶ 1. Yet, he again fails to provide any of the evidence that would be necessary to sustain a "facial" due process challenge.[22] He presents nothing regarding the structure and laws of tribal criminal justice systems nationwide nor the nature of due process protections provided by tribal courts nationwide. He simply asserts that nonmember Indian criminal defendants can not participate in tribal juries or in tribal political life and implies that tribal governments are one of a class of "extraconstitutional sovereigns." Pet. at 16 ¶ 4, 17 ¶ 1. He does so to insert doubt in the mind of this Court regarding the capability of tribal courts to provide adequate due process and to insert intrigue into the case by implying that tribal courts are akin to shadowy courts of ominous foreign sovereigns. The petition should be denied because both points are unsubstantiated and false.

Both of the lower courts, for purposes of organizing their opinions, accepted that Petitioner had raised a cognizable facial due process claim but summarily rejected his claim after considering the due process protections available to nonmember Indians. Both courts applied this Court's precedent in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978) to recognize that, although tribes' powers are not subject to the limitations of the Fifth and Fourteenth Amendments of the Constitution, the Congress, by enacting the ICRA, has stepped in to guarantee citizens adequate protection from tribal government action. The court of appeals concluded that the ICRA

[22] Because the CS&K Tribal Court has stayed proceedings in Petitioner's prosecution pending final resolution of the federal court proceedings, an "as applied" due process challenge would be premature.

conferred all of the criminal protections to Petitioner that he would receive under the Constitution except the right to grand jury indictment and the right to appointed counsel if he could not afford an attorney. The court then further concluded that the right to grand jury did not pertain because the Petitioner was charged with a misdemeanor and that the right to appointed counsel was adequately addressed by tribal provision of a right to appointed counsel.[23] Thus, either Congress or the CS&K Tribes are already providing Petitioner with the protections he seeks.[24] Accordingly, the petition should be denied because the courts below properly evaluated Petitioner's due process claim and rejected it after applying the relevant federal statutes faithfully to this Court's precedent.

This Court has previously been presented with opportunities to adopt Morris's argument regarding his due process rights, but has not. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The Court had its most recent opportunity in *U.S. v. Lara*, where it upheld tribal criminal jurisdiction over nonmember Indians, and ruled that a subsequent prosecution by the federal government does not violate the double jeopardy clause of the U.S. Constitution

---

[23] *Supra* at footnote 8.

[24] Petitioner has other remedies available to him in the event of defect in the procedures of a tribal court, including: due process rights in the form of judicial review in both Tribal and federal courts regarding how the Tribal court applies the 1990 ICRA Amendments against him (i.e., an "as applied" challenge); a unique right derived from his membership in the Leech Lake Band of Chippewa to petition the President for redress of any grievances he may have against the CS&K Tribes pursuant to Article 9 of the Treaty with the Chippewa on February 22, 1855, 10 Stat. 1165 (the process for such a petition is provided through the Department of the Interior at 25 U.S.C. § 2 and 25 C.F.R. Part 2).

because an Indian tribe is "acting in its capacity of a separate sovereign." *Id.* at 210. Of critical importance, the decision upholds Congressional authority to reaffirm the inherent sovereignty of Indian tribes. The Court held that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians." *Ibid.*

In *Lara,* however, the Court expressed a concern regarding an indigent person's right to counsel being protected in tribal courts. *Id.* at 207. The implication is that the Court may review a future case where a non-member Indian has been denied adequate protection of her or his fundamental rights as a criminal defendant under the U.S. Constitution. The Petitioner's case does not raise any of these issues for review. He alleges no criminal due process irregularities in his prosecution, nor could he. This was a simple traffic misdemeanor for exceeding the speed limit, and he has been afforded an opportunity for a hearing and to confront and question the charging police officer. He has counsel. He is not subject to an excessive fine. Accordingly, the petition should be denied because there are no due process irregularities in Petitioner's case.

III. Tribal Criminal Justice Systems, As Developed by Congress and this Court, Are Working To Ensure the Health, Safety and Welfare of All Indian Reservation Residents.

Finally, the petition should be denied because it threatens to destroy a functional jurisdictional system for governing misdemeanor crime in Indian country that the Congress and this Court have interdependently developed. The present system preserves tribal misdemeanor criminal jurisdiction over Indians while precluding tribal

criminal jurisdiction over non-Indians. *Oliphant,* 435 U.S. at 212. It recognizes the capability of tribal courts, but places them subject to the due process protections of the ICRA. It recognizes the complex social, cultural and jurisdictional character of Indian reservations. *Ibid.* As a result, the Court and Congress have developed a criminal jurisdiction system for Indian country that provides for the health and safety of all Indian reservation residents while simultaneously providing adequate due process to Indian criminal defendants. This Court should leave that system intact. If it doesn't, then it will open a jurisdictional void throughout Indian country as a result of its ruling's impact on three federal statutes. The Indian Country General Crimes Act, in pertinent part, proscribes federal jurisdiction over "offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152. The Indian Major Crimes Act imposes federal criminal jurisdiction over fourteen enumerated major crimes, but does *not* include misdemeanor crimes. 18 U.S.C. § 1153. The Assimilative Crimes Act permits the federal government to apply minor state criminal laws and thereby assume jurisdiction over certain misdemeanor offenses, but since the Assimilative Crimes Act is made applicable to Indian reservations through the General Crimes Act, it does not include misdemeanor offenses committed by one Indian against the person or property of another Indian. 18 U.S.C. § 13. As a result, if an Indian commits a misdemeanor crime against another Indian on a non-PL280 reservation, then there is no law to punish the offense except the law of the tribes. See *Keeble v. U.S.*, 412 U.S. 205, 210-212 (1973); *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883); see also *United States v. Errol D. Jr.*, 292 F.3d 1159, 1161-1162 (9th Cir. 2002). Therefore, the practical result of finding in favor of Morris would be to create a

jurisdictional void throughout Indian country regarding misdemeanor crime.[25] The petition should be denied to avoid creating such a dangerous situation.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH P. HOVENKOTTER
(*Counsel for Respondent*)

June 2006

[25] S. Rep. 168, 102nd Cong., 1st Sess. 4 (1991); H.R. Rep. 61, 102nd Cong., 1st. Sess. 3-4 (1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR., Plaintiff, v. Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD INDIAN RESERVATION, Defendant, and UNITED STATES OF AMERICA Intervenor.	**CV 99-82-M-DWM** **Affidavit of James Taylor, Managing Attorney of the Tribal Defenders Office**

Being first duly sworn, James Taylor, Managing Attorney of the Confederated Salish and Kootenai Tribal Defenders Office, and a member of the State Bar of Montana admitted to practice in the United States Federal District Court, depose and say that from personal experience and diligent record keeping I have good grounds upon which to state the following:

1. By Tribal Ordinance, this Office offers representation to all indigent defendants accused in the Tribal Court of criminal offenses punishable by imprisonment. A person is considered indigent if they make less than 200% of the current standard for poverty, as contained in the Federal Poverty Income Guidelines. We offer these services without charge to all indigent defendants, regardless of where they are enrolled. There are four attorneys and one advocate that handle criminal cases in the Tribal Court. This Office makes contact with all individuals charged with criminal offenses, and makes an eligibility determination before an individual's initial appearance. For those we represent, we appear with them beginning at their initial appearance. If there is no possibility of a jail sentence, a defendant still has the right to counsel at his own expense, but not to appointed counsel.

2. During calendar year 2001 the Tribal Defender's Office undertook representation of 746 total individuals in criminal cases including 1329 criminal charges. Of the 746 total individuals, 553 (74%) were enrolled members of the Confederated Salish and Kootenai Tribes ("Tribes"), and 193 (26%) were members from other tribes.

3. During calendar year 2000 the Tribal Defender's Office undertook representation of 828 total individuals in criminal cases including 1557 criminal charges. Of the 828 total individuals, 608 (73%) were enrolled members of the Tribes, and 220 (27%) were members of other tribes.

4. During calendar year 1999 the Tribal Defenders Office undertook representation of 912 total individuals in criminal cases. Of that total, 639 (70%) were enrolled members of the Tribes, and 273 (30%) were members from other tribes.

5. During calendar year 1998 the Tribal Defenders Office undertook representation of 923 total individuals in criminal cases. Of that total, 689 (75%) were enrolled members of the Tribes, and 234 (25%) were members from other tribes.

6. During calendar year 1997 the Tribal Defenders Office undertook representation of 831 total individuals in criminal cases. Of that total, 575 (69%) were enrolled members of the Tribes, and 256 (31%) were members from other tribes.

7. During calendar year 1996 the Tribal Defenders Office undertook representation of 747 total individuals in criminal cases. Of that total, 551 (74%) were enrolled members of the Tribes and 196 (26%) were members from other tribes.

8. From the foregoing information, it appears that the criminal caseload of the Tribal Defenders Office has been composed of approximately 70-75% people from these Tribes, with the balance of 25-30% composed of people from other tribes.

Dated this 9th day of July, 2002.

/s/ James Taylor
James Taylor
Managing Attorney –
Tribal Defenders Office

ACKNOWLEDGMENT

STATE OF MONTANA)

ss.

COUNTY OF LAKE

On this 9th day of July, 2002, before me Susie Loughlin, a Notary Public for the State of Montana, personally appeared James Taylor, known to me to be the person whose name is subscribed to the above Affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal.

/s/ Susie Loughlin

Notary Public for the State of Montana

Residing at St. Ignatius

My Commission expires 12-16-04

Joseph P Hovenkotter
CONFEDERATED SALISH AND KOOTENAI TRIBES
Tribal Legal department
P. O. Box 278
Pablo, Montana 59855
(406) 675-2700

ATTORNEY FOR TRIBAL GOVERNMENTAL DEFENDANT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.,	CV 99-82-M-DWM
Plaintiff,	
v.	AFFIDAVIT OF ACTING CHIEF JUDGE GARY L. ACEVEDO AND ATTORNEY LAW CLERK ROBERT J. STAHL
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD INDIAN RESERVATION,	
Defendant.	

Being first duly sworn, Gary L. Acevedo, Acting Chief Judge of the Confederated Salish and Kootenai Tribal Court, and Robert J. Stahl, Attorney Law Clerk to the Tribal Court and a member of the State Bar of Montana

admitted to practice in the United States Federal District Court, depose and say that from personal experience and diligent inquiry with Tribal Department Heads and other responsible Tribal employees in a position to provide accurate information regarding the matters addressed, we have good reason to make the following representations:

1. Law and Order on the Flathead Reservation would be severely impaired without Tribal jurisdiction over misdemeanors committed by non-member Indians on the Reservation. Without Tribal jurisdiction, non-member Indians would not be held accountable for their misdemeanors. Without Tribal jurisdiction, a rapid increase in non-member Indian misdemeanors seems certain. Most non-member Indians are socially integrated into the reservation Indian community and, consequently, most victims of Indian misdemeanors are other Indians. When non-member Indians commit crimes like domestic abuse, assault, or theft, their victims are other Indians. However, the victims of drunk driving are not restricted to the Indian community but are whoever happens to be on the highway or road at the time.

2. Before the imposition of supervision by the Bureau of Indian Affairs, the Salish and Kootenai customarily treated non-Salish and non-Kootenai Indians living in their midst just as they treated one another. Federal supervision of reservation Indian populations and the allotment process created the tribal enrollment distinction. Previously, membership was a practical reality. If a person lived within an Indian community and participated in its daily life, the person was a member of the community. That person's ancestry may have been relevant to selection for a leadership role but it was not a basis for exclusion from community life or participation in civic

debate. All persons living in the community and participating in community life were held to the same social and moral standards and their transgressions were dealt with in the same fashion. There was no separate justice for visitors or those recently joining the community.

3. Most services provided by the Confederated Salish and Kootenai Tribes (CSKT) are available to all enrolled tribal members of federally recognized tribes without distinction. Very few services are restricted to CSKT members. Non-member Indians comprise a significant percentage of the population served by most CSKT programs and services.

CSKT DEPARTMENT	PROGRAM	INDIAN SERVICE POPULATION	NON-MEMBER INDIANS SERVED (estimates of % of total population served provided by individual Tribal Departments)
Tribal Personnel	Tribal Employment	all but w/Tribal preference	10-15 %
Tribal Court	Civil Adjudication (marriage, divorce, custody, protective orders, civil suit, small claim, fish & game citation)	all w/out distinction	40 % (133 parties in actions filed thus far in 2002)

Tribal Prosecutors	Crime Victims Advocate	all w/out distinction	35 %
Salish Kootenai College	academic & vocational	all w/out distinction	30-35 % (300-350 students)
Kicking Horse Job Corps	Job Corps	all w/out distinction	100 % (245 youths)
Tribal Human Resource Development	TANF (AFDC)	one family member must be enrolled CSKT	40 %
	Child Care	all w/out distinction	25 %
	General Assistance	all w/out distinction	25 %
	Vocational Rehab.	all w/out distinction	20-25 %
	Senior AOA	all w/out distinction	15-20 %
	Commodities	all w/out distinction	15 %
	Kerr Elderly	CSKT exclusive	0 %
	Dire Need	CSKT exclusive	0 %
	Youth Employment	CSKT exclusive	0 %
	Dislocated Workers	CSKT exclusive	0 %
	Senior Meals	all w/out distinction	40 %

	Computer Education	all w/out distinction	10 %
	Trust Management	all w/out distinction	10 %
	Workforce Investment Act	all w/out distinction	20 %
	Care Givers	all w/out distinction	10 %
	Parenting	all w/out distinction	20 %
	WIC	all w/out distinction	10 %
	DOL Temporary Fire	CSKT exclusive	0 %
	Energy Assistance	all w/out distinction	15-20 %
Tribal Head Start	Early Childhood	all w/out distinction	14 %
Tribal Social Services	Child Welfare, Child Protective Services, Foster Care	all w/out distinction	5-10 %
Tribal Health/IHS	Rx & Med. Services	all w/out distinction	32 % (3,588 Patients)
	Mental Health	all w/out distinction	10-20 %
Tribal Housing Authority	NAHSDA & Willow Inn Trailer Park	preference to families w/at least one member enrolled CSKT	5-10 %

DATED this 28th day of May, 2002.

BY: /s/ Gary L. Acevedo
Gary L. Acevedo
Acting Chief Judge of Tribal Court

BY: /s/ Robert J. Stahl
Robert J. Stahl
Attorney Law Clerk to Tribal Court

ACKNOWLEDGMENT

STATE OF MONTANA)
: ss.
COUNTY OF LAKE)

On this 28 day of May, 2002, before me Karen L. Fisher, a Notary Public for the State of Montana, personally appeared Gary L. Acevedo and Robert J. Stahl, known to me to be the persons whose names are subscribed to the above instrument, and acknowledged to me that they both executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal.

/s/ Karen L. Fisher
Notary Public for the State of Montana
Residing at Ronan
My Commission expires 3-17-06

(SEAL)

TITLE I

CHAPTER

CONSTITUTION AND BYLAWS

Part 1

Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended

	Page #
Preamble	
Article I – Territory	1
Article II – Membership	1
Article III – The Tribal Council	2
Article IV – Nominations and Elections	3
Article V – Vacancies and Removals	3
Article VI – Powers and Duties of the Tribal Council	4
Article VII – Bill of Rights	6
Article VIII – Land	6
Article IX – Referendum	6
Article X – Amendments	6
APPENDIX – Indian Civil Rights Act, 25 U.S.C. Section 1302	7

Part 2

Bylaws

Article I – The Tribal Council	7
Article II – Ordinances and Resolutions	8
Article III – Ratification of Constitution and Bylaws	9

TITLE I

CHAPTER 1

CONSTITUTION AND BYLAWS

Part 1

Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended

Preamble

We, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, in order to establish a more responsible organization, promote our general welfare, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of self-government not inconsistent with Federal, State, and local laws, do ordain and establish this Constitution for the Confederated Tribes of the Flathead Reservation.

Article I

Territory

The jurisdiction of the Confederated Salish and Kootenai Tribes of Indians shall extend to the territory within the original confines of the Flathead Reservation as defined in the Treaty of July 16, 1855, and to such other lands without such boundaries, as may here-after be added thereto under any law of the United States, except as otherwise provided by law.

Article II

Membership

Section 1. Confirmation of Rolls. The membership of the Confederated Tribes of the Flathead Reservation is confirmed in accordance with the per capita rolls as from time to time prepared.

Section 2. Present Membership. Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who possess one-fourth (¼) or more Salish or Kootenai Blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. subject to review by the Secretary of the Interior, the Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 3. Future Membership. Future membership may be regulated from time to time by ordinance of the Confederated Tribes subject to review by the Secretary of the Interior. Until and unless an ordinance is adopted any person shall be enrolled as a member who shall (a) apply, or have application made on his behalf, establishing eligibility under this provision; (b) show that he is a natural child of a member of the Confederated Tribes; (c) that he possesses one-quarter (¼) degree or more blood of

the Salish and Kootenai Tribes or both, of the Flathead Indian Reservation, Montana; (d) is not enrolled on some other reservation.

Section 4. Adoption. The Tribal Council shall have the power to enact and promulgate ordinances, subject to review by the Secretary of the Interior, governing the adoption of persons as members of the Confederated Salish and Kootenai Tribes.

Section 5. Loss of Membership. Membership in the Confederated Tribes may be lost (1) by resignation in writing to the Tribal Council; (2) by enrollment of the member with another Indian tribe; (3) by establishing a legal residence in a foreign country; (4) upon proof of lack of eligibility for enrollment, or fraud in obtaining enrollment, with due notice and opportunity to be heard and defend before the Tribal Council, subject to appeal to the Secretary of the Interior, whose decision shall be confined to the record made in such proceeding which, if supported by substantial evidence, shall be binding.

Section 6. Definitions. Wherever the term "Indian Blood" shall have been used herein or in tribal ordinances, unless the context shall require a different meaning, it shall be determined to mean the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation.

Section 7. Current Membership Roll. The membership roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation shall be kept current by striking therefrom the names of persons who have died or have lost membership pursuant to this Constitution and adding thereto the names of persons who shall have established eligibility or been adopted. The roll so prepared shall be the basis for determining the right of persons whose

names appear thereon to share in annual per capita distribution of funds or in any other tribal property, subject to Secretarial approval.

Section 8. Rules of Procedure. The Tribal Council shall have the authority to prescribe rules to be followed in compiling a membership roll in accordance with the provisions of this article, the completed roll to be approved by the Tribal Council of the Confederated Salish and Kootenai Tribes. In case of distribution of tribal assets, the roll shall be submitted to the Secretary of the Interior for final approval as may be provided by law.

Section 9. Rights of Membership are Prospective. No person shall be entitled to receive a per capita payment or share in any other tribal assets which were distributed prior to the date of his actual enrollment.

Article III

The Tribal Council

Section 1. The governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation shall be the Tribal Council.

Section 2. The Council shall consist of ten councilmen to be elected from the districts as set forth hereafter, and Chiefs Martin Charlo and Eneas Paul Koostahtah.

Section 3. Representation from the districts hereby designated shall be as follows: Jocko Valley and Mission Districts, two councilmen each; Ronan, Pablo, Polson, Elmo-Dayton, Hot Springs-Camas Prairie, and Dixon, one councilman each.

Section 4. The Tribal Council shall have the power to change the districts and the representation from each district, based on community organization or otherwise, as deemed advisable, such change to be made by ordinance, but the total number of delegates shall not be changed as provided for in section 2 of article III of this Constitution.

Section 5. The Tribal Council so organized shall elect from within its own number a chairman, and a vice-chairman, and from within or without its own membership, a secretary, treasurer, sergeant-at-arms, and such other officers and committees as may be deemed necessary.

Section 6. No person shall be a candidate for membership in the Tribal Council unless he shall be a member of the Confederated Tribes of the Flathead Reservation and shall have resided in the district of his candidacy for a period of one year next preceding the election.

Section 7. The Tribal Council of the Confederated Tribes of the Flathead Reservation shall be the sole judge of the qualifications of its members.

Article IV

Nominations and Elections

Section 1. The first election of a Tribal Council under this Constitution shall be called and supervised by the present Tribal Council within 30 days after the ratification and approval of this Constitution, and thereafter elections shall be held every two years on the third Saturday prior to the expiration of the terms of office of the members of the Tribal Council. At the first election, five councilmen shall be elected for a period of two years and five for a

period of four years. The term of office of a councilman shall be for a period of four years unless otherwise provided herein.

Section 2. The Tribal Council or an election board appointed by the Council shall determine rules and regulations governing all elections.

Section 3. Any qualified member of the Confederated Tribes may announce his candidacy for the Council, within the district of his residence, notifying the Secretary of the Tribal Council in writing of his candidacy at least 15 days prior to the Election. It shall be the duty of the Secretary of the Tribal Council to post in each district at least 10 days before the election, the names of all candidates for the Council who have met those requirements. Where more than two members have filed for an office a Primary Election shall be held at least 30 days prior to the General Election. Only the two candidates for each office receiving the most votes at such Primary Election shall be eligible to run for office in the General Election. Where no more than two members have filed for an office, a Primary Election will be unnecessary.

Section 4. The Tribal Council, or a board appointed by the Council, shall certify to the election of the members of the Council within 5 days after the election returns.

Section 5. The Tribal Council, or a board appointed by the Tribal Council, shall designate the polling places and appoint all election officials.

Article V

Vacancies and Removals

Section 1. If a councilman or official shall die, resign, permanently leave the reservation, or be removed from office, the Council shall declare the position vacant and appoint a successor to fill the unexpired term, provided that the person chosen to fill such vacancy shall be from the district in which such vacancy occurs.

Section 2. Any councilman who is proven guilty of improper conduct or gross neglect of duty may be expelled from the Council by a two-thirds vote of the membership of the Council voting in favor of such expulsion, and provided further, that the accused member shall be given full and fair opportunity to reply to any and all charges at a designated Council meeting. It is further stipulated that any such member shall be given a written statement of the charges against him at least five days before the meeting *at which he is to* appear.

Article VI

Powers and Duties of the Tribal Council

Section 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or the Constitution of the United States and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws;

(a) To regulate the uses and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to

protect the health, security, and general welfare of the Confederated Tribes.

(b) To employ legal counsel for the protection and advancement of the rights of the Flathead confederated Tribes and their members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To negotiate with the Federal, State, and local governments on behalf of the confederated Tribes, and to advise and consult with the representatives of the Departments of the Government of the United States on all matters affecting the affairs of the Confederated Tribes.

(d) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands and tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other agency of the Government, *provided* that no tribal lands shall be sold or encumbered or leased for a period in excess of five years, except for Governmental purposes.

(e) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Confederated Tribes, prior to the submission of such estimates to the Congress.

(f) To manage all economic affairs and enterprises of the Confederated Tribes in accordance with the terms of a charter to be issued by the Secretary of the Interior.

(g) To make assignments of tribal lands to members of the Confederated Tribes in conformity with article VIII of this Constitution.

(h) To appropriate for tribal use of the reservation any available applicable tribal funds, provided that any such appropriation in excess of $25,000 shall be subject to review by the Secretary of the Interior.

(i) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon nonmembers doing business within the reservation, or obtaining special rights or privileges, and the same may also be applied to members of the Confederated Tribes, provided such ordinances have been approved by a referendum of the Confederated Tribes.

(j) To exclude from the restricted lands of the reservation persons not legally entitled to reside thereon, under ordinances which may be subject to review by the Secretary of the Interior.

(k) To enact resolutions or ordinances not inconsistent with article II of this Constitution governing adoptions and abandonment of membership.

(l) To promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Confederated Tribes, and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court, and defining its powers and duties.

(m) To purchase land of members of the Confederated Tribes for public purposes under condemnation proceedings in courts of competent jurisdiction.

(n) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the Confederated Tribes by

regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior.

(o) To charter subordinate organizations for economic purposes and to regulate the activities of all cooperative and other associations which may be organized under any charter issued under this Constitution.

(p) To regulate the inheritance of real and personal property, other than allotted lands, within the Flathead Reservation, subject to review by the Secretary of the Interior.

(q) To regulate the domestic relations of members of the Confederated Tribes.

(r) To recommend and provide for, the appointment of guardians for orphans, minor members of the Confederated Tribes, and incompetents subject to the approval of the Secretary of the Interior, and to administer tribal and other funds or property which may be transferred or entrusted to the Confederated Tribes or Tribal Council for this purpose.

(s) To create and maintain a tribal fund by accepting grants or donations from any person, State, or the United States.

(t) To delegate to subordinate boards or to cooperative associations which are open to all members of the Confederated Tribes, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

(u) To adopt resolutions or ordinances to effectuate any of the foregoing powers.

Section 2. Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the superintendent shall transmit of copy of the same, bearing his endorsement, to the Secretary of the Interior who may, within 90 days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the council of such action: *Provided.* That if the Superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten days after its enactment, he shall advise the Council of his reasons therefor, and the Council, if such reasons appear to be insufficient, may refer it to the Secretary of the Interior, who may pass upon same and either approve or disapprove it within 90 days from its enactment.

Section 3. The council of the Confederated Tribes may exercise such further powers as may in the future be delegated to it by the Federal Government, either through order of the Secretary of the Interior or by Congress, or by the State Government or by members of the Confederated Tribes.

Section 4. Any rights and powers heretofore vested in the confederated Tribes but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the members of the Confederated Tribes through the adoption of appropriate bylaws and constitutional amendments.

Article VII

Bill of Rights

Section 1. All members of the Confederated Tribes over the age of 18 years shall have the right to vote in all tribal elections, subject to any restricts as to residence as set forth in Article IV.

Section 2. All members of the Confederated Tribes shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.

Section 3. All members of the Confederated Tribes may enjoy without hindrance freedom of worship, speech, press, and assembly.

Section 4. Any member of the confederated Tribes accused of any offense, shall have the right to a prompt, open, and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf and trial be jury shall be accorded, when duly requested, by any member accused of any offense punishable by more than 30 days' imprisonment, and excessive bail or cruel or unusual punishment shall not be imposed.

Article VIII

Land

Section 1. Land Transactions. subject to any limitations imposed by the Constitution and Bylaws, to any applicable Federal statute and to the approval of the Secretary of the Interior, the Tribal Council may:

(1) Purchase or receive by gift or relinquishment land or any interest therein, and may lease, exchange (with or

without the giving or receipt of other consideration), encumber, and assign tribal lands or any interest therein; and

(2) Adopt ordinances or resolutions governing any or all such transactions.

Section 2. Saving Clause. Nothing herein shall be held to impair rights heretofore acquired in any allotment or assignment held by any individual.

Article IX

Referendum

Section 1. Upon a petition of at least one-third (⅓) of the eligible voters of the Confederated Tribes, or upon the request of a majority of the members of the Tribal Council, any enacted or proposed ordinance or resolution of the council shall be submitted to a popular referendum, and the vote of a majority of the qualified voters voting in such referendum shall be conclusive and binding on the Tribal Council, provided that at least thirty percent (30%) of the eligible voters shall vote in such election.

Article X

Amendments

Section 1. This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the Confederated Tribes voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty percent (30%) of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment, at the request of two-thirds of the Council, or upon presentation of a petition signed by one-third (⅓) of the qualified voters, members of the Confederated Tribes.

APPENDIX

****

Indian Civil Rights Act, 25 U.S.C. Section 1302

No Indian tribe in exercising powers of self-government shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature

and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of (one year) or a fine of ($5000) or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Part 2

Bylaws

Article I

The Tribal Council

Section 1. The Chairman of the Council shall preside over all meetings of the Council, perform all duties of chairman, and exercise any authority detailed to him, and he shall be entitled to vote on all questions.

Section 2. The vice chairman shall assist the chairman when called on so to do, in the absence of the chairman shall preside, and when so presiding shall have all the privileges, duties, and responsibilities of the chairman.

Section 3. The Council secretary shall forward a copy of the minutes of all meetings to the Superintendent of the Reservation and to the Commissioner of Indian Affairs.

Section 4. The duties of all appointed boards or officers of the organization shall be clearly defined by resolutions of the Council at the time of their creation or appointment. Such boards and officers shall report from time to time as required to the Council and their activities and decisions shall be subject to review by the Council upon petition of any person aggrieved.

Section 5. Newly elected members who have been duly certified shall be installed at the first regular meeting of the Tribal Council.

Section 6. Each member of the Tribal Council and each officer or subordinate officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath, he shall pledge himself to support and defend the constitution of the United States – and this Constitution and Bylaws. The following form of oath of office shall be given: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, to carry out faithfully and impartially, the duties of my office to the best of my ability; to cooperate, promote, and protect the best interests of my Tribe, in accordance with this Constitution and Bylaws."

Section 7. Regular meetings of the Tribal Council shall be held on the first Friday of January, April, July, and October, at 9:00 a.m., at the Flathead Agency.

Section 8. Special meetings may be called by a written notice signed by the chairman or a majority of the Tribal

Council and when so called the Tribal council shall have power to transact business as in regular meetings.

Section 9. No business shall be transacted unless a quorum is present which shall consist of two-thirds (⅔) of the entire membership.

Section 10. Order of business:

(a) Call to order by chairman.
(b) Roll call.
(c) Reading of minutes of last meeting.
(d) Unfinished business.
(e) Reports.
(f) New business.
(g) Adjournment.

Section 11. It shall be the duty of each member of the Tribal Council to make reports to the district from which he is elected, concerning the proceedings of the Tribal Council.

Section 12. The Tribal council may prescribe such salaries for officers or members of the council as it deems advisable, from such funds as may be available.

Article II

Ordinances and Resolutions

Section 1. All final decisions of the Council on matters of general and permanent interest to the members of the Confederated Tribes shall be embodied in ordinances. Such ordinances shall be published from time to time for the information and education of the members of the Confederated Tribes.

Section 2. All final decisions of the Council on matters of temporary interest (such as action on the reservation budget for a single year, or petitions to Congress or the Secretary of the Interior) or relating especially to particular individuals or officials (such as adoption of members, instructions for tribal employees or rules of order for the Council) shall be embodied in resolutions. Such resolutions shall be recorded in a special book which shall be open to inspection by members of the Confederated Tribes.

Section 3. All questions of procedure (such as acceptance of Committee reports or invitations to outsiders to speak) shall be decided by action of the Council or by ruling of the Chairman, if no objection is heard. In all ordinances, resolutions or motions the Council may act by majority vote, but all matters of importance shall be fully discussed and a reasonable attempt shall be made to secure unanimous agreement.

Section 4. Legislative forms. Every ordinance shall begin with the words: "Be it enacted by the Council of the Confederated Salish and Kootenai Tribes –."

Section 5. Every resolution shall begin with the words: "Be it resolved by the Council of the Confederated Salish and Kootenai Tribes –."

Section 6. Every ordinance or resolution shall contain a recital of the laws of the United States and the provisions of this Constitution under which authority for the said ordinance or resolution is found.

Article III

Ratification of Constitution and Bylaws

This Constitution and the attached Bylaws, when adopted by a majority vote of the voters of the Confederated Tribes voting at a special election called by the Secretary of the Interior, in which at least thirty (30) percent of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be in force from the date of such approval.

MEMORANDUM OF AGREEMENT BETWEEN STATE OF MONTANA, FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF RONAN, TOWN OF ST. IGNATIUS AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

WHEREAS, the 1993 Montana Legislature enacted Senate Bill 368, which provided for the partial withdrawal of the consent of the Confederated Salish and Kootenai Tribes of the Flathead Nation [Tribes] to Public Law 280 jurisdiction on the Flathead Reservation; and

WHEREAS, Senate Bill 368 is codified in the Montana statutes at Mont. Code Ann. § 2-1-306 (1993) which provides that the Flathead Nation may, by tribal resolution, withdraw consent to be subject to the criminal misdemeanor jurisdiction of the State of Montana [State] and that within six months after receipt of a tribal resolution withdrawing tribal consent the Governor shall issue a proclamation to that effect; and

WHEREAS, the Tribes, the State, and affected county and local governments have a mutual desire to provide for a smooth implementation of tribal reassumption of exclusive jurisdiction over misdemeanor crimes committed by Indians; and

WHEREAS, the overriding purpose of this Memorandum of Agreement [Agreement] is to provide for timely and effective law enforcement and the protection of the public safety; and

WHEREAS, this Agreement is entered into pursuant to the State-Tribal Cooperative Agreements Act, codified at Mont. Code Ann. §§ 18-11-101 through -112 and Article VI, Section 1(c) of the Constitution of the Tribes approved by the Secretary of the Interior on October 28, 1935; and

WHEREAS, the Tribes, the State, and affected local governments shall act in good faith to effectuate the specific provisions of this Agreement; and

WHEREAS, the Tribe's resolution to withdraw from Public Law 280 includes language allowing continued state misdemeanor criminal jurisdiction in limited areas as specifically delineated in the body of the agreement.

NOW, THEREFORE, BE IT RESOLVED THAT THE FLATHEAD NATION AND, THE STATE OF MONTANA, FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, THE CITY OF RONAN, AND THE TOWN OF ST. IGNATIUS ENTER INTO THIS MEMORANDUM OF AGREEMENT AS FOLLOWS:

I. LAW ENFORCEMENT

A. DISPATCH ASSESSMENT OF INCOMING CALLS

1. EXIGENT CIRCUMSTANCES

Upon receiving an incoming call, tribal, state, county and city dispatch officers will dispatch the nearest officer to the scene of a crime where exigent circumstances do not allow for an assessment of whether the persons involved are Indian or non-Indian.

2. ASSESSMENT OF DISPATCH CALLS

When an incoming call to dispatch is not an immediate exigent emergency, the dispatcher shall determine the:

a. nature of the call;

b. possible suspect/victims; and

c. location of incident.

3. REFERRAL TO APPROPRIATE AGENCIES

If the key parties to the incident are Indian, and it is not clear that the reported offense would be charged as a felony, state, county or city dispatchers will relay the information directly to tribal dispatch. If the key parties to the incident are Indian and tribal dispatch receives the call, tribal dispatch will contact tribal officers. If the key parties are non-Indian and tribal dispatch received the call, tribal dispatch will relay the information directly to the appropriate state, county or city dispatch officer. In either situation, the person making the call will not be told to call the other jurisdiction. The dispatchers of the respective jurisdictions shall directly relay information to the appropriate dispatch office.

4. UNCLEAR ASSESSMENT

If a clear assessment of the status of the key parties is not possible by dispatchers, direct law enforcement services will be provided by the jurisdiction receiving the call.

B. OFFICER RESPONSE TO DISPATCH CALLS

1. FIELD RESPONSE TO DISPATCH CALLS

Law enforcement officers dispatched into the field, either as the nearest officer available for exigent circumstances or as the appropriate officer due to the status of the persons involved, shall respond as immediately as possible. Once dispatched, officers shall attempt no assessment of proper jurisdiction until public safety is secured. If it is clear to the law enforcement officer that the offense committed will be charged as a felony, the officer will proceed pursuant to the authority of the jurisdiction represented. If it is unclear whether the offense will be charged as a felony or as a misdemeanor, the officer will determine the status of the suspect involved.

2. FIELD DETERMINATION OF "INDIAN"

Law enforcement officers will determine the Indian/non-Indian status of a suspect at the crime scene as soon as reasonable after providing any emergency law enforcement services and securing public safety. For purposes of the Agreement an "Indian" is a person who is an enrolled member of a federally-recognized tribe. To make such determination, the suspect will be questioned as to whether she/he is an Indian.

a. Self-identification as Indian With Proof of Enrollment

If the suspect responds in the affirmative, the officer will obtain enrollment information and call the tribal dispatch officer, who will verify the enrollment status via contacting the specified Tribe's dispatch office and requesting an enrollment verification. If the suspect's Indian

status is verified, the non-tribal officer will request tribal officer response if necessary.

b. Self-identification as Indian Without Proof of Enrollment

If the suspect claims to be an Indian to the non-tribal officer but is unable to provide enrollment information, the suspect will properly be within the jurisdiction of the responding non-tribal officer until enrollment information is secured or until a successful defense of lack of jurisdiction is raised at trial.

If the suspect claims to be an Indian to a responding tribal officer but is unable to provide verifying information, the suspect is properly within the jurisdiction of the Tribes unless a successful defense of lack of jurisdiction is raised at trial.

C. TRAFFIC STOPS

1. NON-TRIBAL OFFICER STOPS

A non-tribal law enforcement officer may stop *any* vehicle upon a reasonable suspicion of criminal activity. The non-tribal officer may also conduct a protective frisk of the suspect and the area in the suspect's immediate control, whether Indian or non-Indian, if the officer reasonably believes that the suspect may be armed with a weapon.

The non-tribal officer must then determine the Indian/non-Indian status of the suspect. If the suspect is Indian, as verified by the tribal dispatch, the officer may, either issue a citation for the alleged violation pursuant to

section D or, if the officer determines that an arrest is necessary, request response by a tribal officer.

The non-tribal officer shall have authority to detain the Indian suspect pursuant to Section E: Unavailability of an Appropriate Officer.

2. TRIBAL OFFICER TRAFFIC STOPS

A tribal officer may stop any vehicle upon a reasonable suspicion of criminal activity. The tribal officer may also conduct a protective frisk of the suspect and the area in the suspect's immediate control, whether Indian or non-Indian, if the officer reasonably believes that the suspect may be armed with a weapon.

The tribal officer must then determine the Indian/non-Indian status of the suspect. If the suspect is non-Indian, the tribal officer may either issue a citation for the alleged violation pursuant to section D or, if the officer determines that an arrest is necessary, request response by a non-tribal officer.

The tribal officer shall have authority to detain the suspect until the arrival of the non-tribal officer pursuant to Section E: Unavailability of an Appropriate Officer.

D. CITATION AUTHORITY

1. TRIBAL OFFICERS

Officers who have met tribal requirements for certification and who have been certified by the Tribes as law enforcement officers are hereby commissioned by each other party to this Agreement to exercise limited authority within those portions of the respective jurisdictions which

lie within the exterior boundaries of the Flathead Indian Reservation. These tribal officers may exercise authority limited to that necessary for issuance of citations for violations of the state traffic laws and laws regarding minors in possession of alcohol. This authority includes that necessary to collect bond for the respective jurisdiction.

When a tribal officer makes a stop upon a reasonable suspicion of a criminal violation and determines 1) that the suspect is a non-Indian and 2) that an arrest is not necessary, the tribal officer is commissioned to act as an agent of the appropriate non-tribal jurisdiction and issue a citation for violation of state traffic laws and laws regarding minors in possession of alcohol.

2. NON-TRIBAL OFFICERS

Officers who have met the necessary requirements for certification as law enforcement officers of the respective state, county and city jurisdictions and who have been certified by the respective jurisdiction are hereby commissioned by the Tribes to exercise authority within the exterior boundaries of the Flathead Reservation. These non-tribal officers may exercise authority limited to that necessary for issuance of citations for violations of the tribal traffic ordinances and ordinances regarding minors in possession of alcohol. This authority includes that necessary to collect bond for the Tribes.

When a non-tribal officer makes a stop upon a reasonable suspicion of a violation and determines 1) that the suspect is an Indian and 2) that an arrest is not necessary, the non-tribal officer is commissioned to act as an agent of the Tribes and issue a citation for violation of tribal traffic

ordinances and ordinances regarding minors in possession of alcohol.

3. CHAIN OF COMMAND

The chain of command for the law enforcement officers of the parties to this Agreement shall not be changed by the granting of authority to issue citations on behalf of a jurisdiction other than that of the officer. Officers will continue to report to and be accountable to superiors to whom they now report.

4. LIABILITY

Each party shall remain liable for the actions of their employees for purposes of this Section of the Agreement to the same extent that they are currently. No parties assume liability for employees of the other parties for actions authorized by this Section providing for citation authority.

E. UNAVAILABILITY OF APPROPRIATE OFFICER WHEN ARREST NECESSARY

1. STOP BY NON-TRIBAL OFFICER

If upon a request from a non-tribal officer, a tribal officer determines he is unable to respond to a traffic stop which necessitates an arrest of an Indian person for protection of public safety within 30 minutes of the detention of the Indian suspect, the tribal officer may authorize the non-tribal officer to arrest and transport the suspect to the Tribal Law and Order facility. Such arrest and transport in a traffic-stop situation cannot occur without the express grant of authority from the tribal officer to the non-tribal officer pursuant to section F. An arrest made

with an express grant of authority from the tribal officer includes a grant of authority to completely process the suspect for the crime.

If the traffic stop of an Indian suspect by a non-tribal officer does not warrant the arrest of the suspect, the non-tribal officer may issue a citation for the alleged violation pursuant to section D or file a report of probable cause and report of traffic violation to the tribal prosecutor's office.

2. STOP BY A TRIBAL OFFICER

If upon request from a tribal officer the non-tribal officer determines he is unable to respond to a traffic stop which necessitates an arrest of a non-Indian within 30 minutes of the detention of the non-Indian suspect, the non-tribal officer may authorize the tribal officer to arrest and transport the suspect to the county or city law enforcement facilities. Such arrest and transport in a traffic-stop situation cannot occur without the express grant of authority from the non-tribal officer to the tribal officer pursuant to section F. An arrest made with an express grant of authority from the non-tribal officer includes a grant of authority to completely process the suspect for the crime.

If the traffic stop of a non-Indian suspect by a tribal officer does not warrant the arrest of the suspect, the tribal officer may issue a citation for the alleged violation pursuant to section D or file a report of probable cause and report of traffic violation to the tribal prosecutor's office who will then forward it to the appropriate prosecutor's office.

F. ARREST AUTHORITY

1. ARREST BY NON-TRIBAL OFFICER OF TRIBAL SUSPECT

A non-tribal officer may make an arrest of an Indian person only when granted authority to do so by a tribal officer after the tribal officer indicates he is unable to assure he can be at the scene within 30 minutes of the detention of the Indian suspect, and:

a. the non-tribal officer establishes to tribal officer that probable cause for the arrest exists, or

b. when the crime by the Indian person is committed or being committed in the non-tribal officer's presence and an arrest is necessary to protect the public or preserve the evidence.

The tribal officer may give a verbal grant of authority arrest to the non-tribal officer.

2. ARREST BY TRIBAL OFFICER OF NON-INDIAN SUSPECT

A tribal officer may make an arrest of a non-Indian suspect only when granted authority to do so by a non-tribal officer after the non-tribal officer indicates he is unable to assure he can be at the scene within 30 minutes of the detention of the non-Indian suspect, and:

a. the tribal officer establishes to the non-tribal officer that probable cause for the arrest exists, or

b. when the crime by the non-Indian person is committed or being committed in the tribal officer's presence and an arrest is necessary to protect the public or preserve the evidence.

The non-tribal officer may give a verbal grant of authority for arrest to the tribal officer.

3. LIABILITY

Each party shall remain liable for the actions of their employees for purposes of this Section of the Agreement to the same extent that they are currently. No parties assume liability for employees of the other parties for actions authorized by this Section providing for arrest authority.

G. INVESTIGATIONS

1. UNKNOWN SUSPECT

a. When the suspect is unknown and exigent circumstances do not allow for an assessment of whether the persons involved in an incident are Indian or non-Indian, officers of the responding jurisdiction will stabilize the situation and take the lead in the necessary investigatory work.

b. When the suspect is unknown and it is determined that the victims are both Indian and non-Indian, the responding jurisdiction will lead the investigation with the cooperation of the other jurisdictions until the identity of the suspect is determined.

c. When the suspect is unknown and it is determined that the victim is Indian, the tribal officers will take the lead in the investigation until the identity of the suspect is determined.

d. When the suspect is unknown and it is determined that the victim is non-Indian, the non-tribal

officers will take the lead in the investigation until the identity of the suspect is determined.

2. KNOWN SUSPECT

a. When the suspect is known to be Indian, the tribal officers will take the lead in the investigation.

b. When the suspect is known to be non-Indian, non-tribal officers will take the lead in the investigation.

c. When there are multiple suspects known to be Indian and non-Indian the respective jurisdictions will each conduct investigations in preparation for separate prosecutions. However, each jurisdiction will fully cooperate with the other jurisdiction in its investigation and will share investigatory information with the other jurisdictions.

3. COST OF INVESTIGATIONS

Each jurisdiction will cover the costs of investigations conducted by its officers.

4. LIABILITY

Each law enforcement agency shall assume liability for the conduct of its officers during all investigations.

H. COOPERATIVE MEETINGS

1. COOPERATION BETWEEN LOCAL LAW ENFORCEMENT AGENCIES

At least two joint meetings of all law enforcement agencies shall occur either before or within one month of

effectuating partial retrocession. One cross-training meeting shall occur at the Tribal Law and Order Department and one cross-training session shall occur at a facility of a county or city jurisdiction.

II. CRIMINAL PROCEEDINGS

A MISDEMEANORS

1. All misdemeanor crimes committed by Indians shall be prosecuted in the Confederated Salish and Kootenai Tribal Court with the exception of those misdemeanor convictions resulting from a guilty plea, entered in state court, pursuant to a plea bargain agreement reducing a felony to a misdemeanor or the result of a conviction in state court on a lesser included offense in a felony trial.

2. The State may retain jurisdiction of Indian persons for misdemeanor crimes in the limited circumstances that they result from a reduction of a felony offense due to a lesser included offense jury instruction at trial. If probation is a part of the sentence, it may be monitored by tribal probation personnel pursuant to agreement between the Department of Corrections and Human Services and the Tribes.

3. The State may retain jurisdiction of Indian persons for misdemeanor crimes in the limited circumstance that they result from plea bargains which are negotiated before a trial verdict which reduce felony crimes to misdemeanors. If probation is a condition of the plea bargain, such probation may be monitored by tribal probation personnel pursuant to agreement between the Department of Corrections and Human Services and the Tribes.

B. CONCURRENT TRIBAL/STATE FELONY JURISDICTION

The Tribes continue to retain concurrent jurisdiction with the State over felony crimes committed by Indians but may transfer prosecution of such crimes to the State. Factors the Tribes will consider when retaining jurisdiction over felony crimes include:

1. Seriousness of crime
2. Age of Defendant
3. Criminal History of Defendant
4. Ties to the Reservation
5. Family on Reservation
6. Sentence upon conviction in state court versus actual jail time likely in tribal jail
7. Prospect of rehabilitation
8. Access to appropriate services.

The State continues to retain jurisdiction, concurrent with that of the Tribe, over felony crimes committed by Indians but may transfer prosecution of such crimes to the Tribes if warranted.

C. TRANSFER OF PROSECUTION

1. REDUCTION FROM FELONY TO MISDEMEANOR BEFORE TRIAL

When a crime is charged as a felony by the State but prosecutorial discretion necessitates a reduction to a misdemeanor before trial, the state prosecutor will inform the tribal prosecutor. After providing adequate time for the tribal prosecutor to file the charging document in tribal

court, the State will move to dismiss its action without prejudice.

2. UPGRADE FROM MISDEMEANOR TO FELONY BEFORE TRIAL

When a crime is charged as a misdemeanor in tribal court but evidence necessitates an increase to a felony before trial and the tribal prosecutor determines that the case should be transferred to the State, the tribal prosecutor will inform the appropriate county attorney. After providing adequate time for the county attorney to file the charging document in state court, the tribal prosecutor will move to dismiss its action without prejudice.

D. PROBATION

1. Probation ordered for all tribal defendants in Tribal Court shall be monitored by tribal probation personnel.

2. Probation ordered for all tribal defendants who are convicted in a state district court for a felony offense shall remain under state jurisdiction but may be supervised by tribal probation personnel pursuant to agreement between the Department of Corrections and Human Services and the Tribes. Tribal probation personnel shall fulfill reporting requirements of state jurisdictions for purposes of revocation. Such revocations shall be within state jurisdiction when the conviction and ordered probation occurred within a state jurisdiction.

E. TESTIMONY OF LAW ENFORCEMENT OFFICERS AT TRIAL

All non-tribal law enforcement officers shall abide by the subpoena power of tribal court jurisdiction and all tribal law enforcement officers shall abide by the subpoena power of state court jurisdiction. Specifically, law enforcement officers agree to provide testimony in all jurisdictions as appropriate.

F COMMUNICATION BETWEEN TRIBES AND LOCAL AGENCIES

The tribal prosecutors and the state prosecutors shall meet bi-monthly for a period of six months. At the end of the six-month period, the frequency of such meetings shall be reviewed. These meetings will allow an open exchange of information on pending cases to insure that each jurisdiction is prosecuting cases appropriate for that jurisdiction in good faith. Communication with other jurisdictions shall be on a case-by-case basis.

III. GENERAL PROVISIONS

A. JURISDICTION OF STATE COURTS ENTERING JUDGMENT PRIOR TO DATE OF RETROCESSION

Any state court issuing a judgment of conviction for a misdemeanor offense by an Indian prior to the effective date of retrocession will maintain jurisdiction over the case and the defendant, including jurisdiction to issue contempt orders, until the judgment of conviction is fully satisfied.

B. PUBLIC ACCESS TO COURT DOCKETS

Court dockets of the courts of the respective jurisdictions will be open to the public.

C. REVIEW OF PROCESS

In order that the parties to this Agreement may continue to provide cooperative and efficient law enforcement services to the people residing on the Flathead Reservation, the Attorney General for the State will convene a meeting of representatives of the participating jurisdictions no later than March 31, 1995, to review the procedures provided for in this Agreement.

D. EFFECTIVE DATE AND TERM

The Agreement shall become effective upon execution by the parties on either the date of execution or the date the Governor of Montana issues the proclamation retroceding criminal misdemeanor jurisdiction to the Tribes, whichever comes later.

This Agreement shall be in effect for a term of five (5) years from the effective date unless earlier terminated as herein provided. Prior to the expiration of this Agreement, or upon its termination, the parties may agree to the renewal of the Agreement for a term agreed upon by the parties.

E. TERMINATION AND WITHDRAWAL

This Agreement may be terminated at any time upon written consent of all parties. Any party may withdraw from this Agreement provided said party gives notice of

withdrawal to all other parties by certified mail at least 120 days prior to such withdrawal.

F. AMENDMENTS

This Agreement may be amended at any time provided said amendments are in writing and signed by all parties to the Agreement.

G. NEGATIVE DECLARATION

Nothing in this Agreement shall be deemed as a concession by any party as to any other party's jurisdictional claims or an admission of the same, or a waiver of the right to challenge such claims upon termination of the Agreement. Nothing in this Agreement shall prejudice the right of any individual to challenge the regulatory or adjudicatory jurisdiction of either party. Neither this Agreement nor the activities of the parties pursuant to this Agreement shall be deemed as enlarging or diminishing the jurisdiction or authority of any of the parties within the Flathead Reservation.

H. NOTICES

All notices and other communications required to be given hereunder by the Parties to this Agreement shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

1. If to the Tribes:

   Chairman
   Confederated Salish and Kootenai Tribes
   P.O. Box 278
   Pablo, Montana 59855

2. If to the State:

   Attorney General
   Department of Justice
   215 North Sanders
   Helena, Montana 59620-1404

3. If to Flathead County

   Flathead County Commissioners
   Flathead County Courthouse
   920 South Main
   Kalispell, MT 59901

4 If to Lake County

   Lake County Commissioners
   Lake County Courthouse
   106 4th Ave. East
   Polson, MT 59860

5. If to Missoula County

   Missoula County Commissioners
   Missoula County Courthouse
   200 West Broadway
   Missoula, MT 59802

6. If to Sanders County

   Sanders County Commissioners
   Sanders County Courthouse
   Thompson Falls, MT 59873

7 If to the City of Hot Springs

Mayor
City of Hot Springs City Hall
Hot Springs, MT 59845

8. If to the City of Ronan

Mayor
City of Ronan
109 Second Avenue Southwest
Ronan, MT 59864

9. If to the Town of St. Ignatius

Mayor
City of St. Ignatius City Hall
St. Ignatius, MT 59865

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

CONFEDERATED SALISH AND KOOTENAI TRIBES

/s/ Michael T. Pablo
MICHAEL T. PABLO, Tribal Chairman

DATED 9/30/94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

STATE OF MONTANA

/s/ Joseph P. Mazurek
JOSEPH P. MAZUREK, Attorney General

DATED 9-30-94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

FLATHEAD COUNTY COMMISSIONERS

/s/ William D. Hedstrom
WILLIAM D. HEDSTROM

/s/ Howard Gipe
HOWARD GIPE

SHARON STRATTON

DATED 10-3-94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

LAKE COUNTY COMMISSIONERS

MIKE HUTCHIN

JERRY NEWGARD

DAVE STIPE

DATED

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

MISSOULA COUNTY COMMISSIONERS

/s/ Fern Hart
FERN HART

/s/ Barbara Evans
BARBARA EVANS

/s/ Ann Mary Dussault
ANN MARY DUSSAULT

DATED 9/28/94

ATTEST:

/s/ Vickie M. Zeier
VICKIE M ZEIER
CLERK & RECORDER

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

SANDERS COUNTY COMMISSIONERS

/s/ Norman E. Resler
NORMAN E. RESLER

/s/ Cherie Hooten
CHERIE HOOTEN

/s/ Jack Marriman
JACK MARRIMAN

DATED 9-29-94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

CITY OF HOT SPRINGS

/s/ Irwin D. Bangen, Mayor
IRWIN D. BANGEN, Mayor

DATED 9/30/94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

CITY OF RONAN

Signed under protest
/s/ George Atkinson
GEORGE ATKINSON, Mayor

DATED 9-30-94

MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF MONTANA,
FLATHEAD COUNTY, LAKE COUNTY, MISSOULA COUNTY, SANDERS COUNTY, CITY OF HOT SPRINGS, CITY OF POLSON, CITY OF RONAN
TOWN OF ST. IGNATIUS
AND
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

SIGNATURE PAGE

TOWN OF ST. IGNATIUS

/s/ Sam Rouillier
SAM ROUILLIER, Mayor

DATED 10-4-94

State of Montana

Proclamation

WHEREAS, the State of Montana obligated itself to assume criminal jurisdiction over Indians on the Flathead Indian Reservation in accordance with the consent of the United States given by the act of August 15, 1953, 67 Stat. 590, and 1963 Mont. Laws, ch. 81, § 1; and

WHEREAS, the Confederated Salish and Kootenai Tribal Council adopted Ordinance 40A (revised) granting the State of Montana permission to assume concurrent jurisdiction over certain subjects, including the extension of the state criminal laws over Indians; and

WHEREAS, the State of Montana, through the enactment of 1993 Mont. Laws, ch. 542 (codified at Mont. Code Ann. § 2-1-306), provided that the Confederated Salish and Kootenai Tribes could, through tribal resolution, withdraw consent to be subject to the criminal misdemeanor jurisdiction of the State of Montana; and

WHEREAS, the Confederated Salish, and Kootenai Tribal Council recognizes the State of Montana will continue the exercise of concurrent felony criminal jurisdiction over Indians on the Flathead reservation; and

WHEREAS, on April 1, 1994, the Confederated Salish and Kootenai Tribal Council passed Resolution No. 94-123, withdrawing tribal consent allowing the State of Montana to exercise concurrent jurisdiction over Indians committing misdemeanor criminal offenses within the external boundaries of the Flathead Indian Reservation; except, to

the extent that the State of Montana needs permission from the Confederated Salish and Kootenai Tribes to negotiate plea bargains of felony charges resulting in misdemeanor convictions; and to the extent necessary to allow state courts to provide appropriate jury instructions in felony trials which would include conviction on "lesser included misdemeanor offenses."

NOW, THEREFORE, I, MARC RACICOT, Governor of the State of Montana, do hereby proclaim that the State of Montana retrocedes to the United States all jurisdiction over Indians committing misdemeanor criminal offenses within the external boundaries of the Flathead Indian Reservation, except to the extent that the State of Montana negotiates plea bargains of felony charges resulting in misdemeanor convictions, and to the extent the courts of the State of Montana provide appropriate jury instructions in felony trials which would result in conviction of a lesser included misdemeanor offense.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the GREAT SEAL OF THE STATE OF MONTANA to be affixed. DONE at the City of Helena, the Capital, this *thirtieth* day of *September*, in the year of our LORD, one thousand nine hundred and *ninety-four*

/s/ Marc Racicot
MARC RACICOT
Governor of Montana

ATTEST:

/s/ Mike Cooney
MIKE COONEY

(2)

FILED
JUN 9 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1285

In the Supreme Court of the United States

THOMAS LEE MORRIS, A MINOR CHILD, ET AL.,
PETITIONERS

v.

JUDGE TANNER, JUDGE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT FOR THE FLATHEAD RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

WILLIAM B. LAZARUS
E. ANN PETERSON
R. JUSTIN SMITH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Indian Civil Rights Act of 1968, 25 U.S.C. 1301, 1302, restores to Indian Tribes their inherent power to try misdemeanor criminal offenses committed by nonmember Indians in Indian country. The questions presented are:

1. Whether those provisions of the Indian Civil Rights Act of 1968 violate equal protection.

2. Whether those provisions of the Indian Civil Rights Act of 1968 violate due process.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 10
Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 12
Baldwin v. *New York*, 399 U.S. 66 (1970) 12
Blanton v. *City of N. Las Vegas*, 489 U.S. 538 (1989) 12
Dawevendewa v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000) 8
Duro v. *Reina*, 495 U.S. 676 (1990) 3, 8, 11
Fisher v. *District Court*, 424 U.S. 382 (1976) 7, 10
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 8
Means v. *Navajo Nation*, 432 F.3d 924 (9th Cir. 2005) 6, 7, 12
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 7
Morton v. *Mancari*, 417 U.S. 535 (1974) 5, 7, 8, 10
Negonsott v. *Samuels*, 507 U.S. 99 (1993) 2
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 3

Cases—Continued: Page

United States v. *Rogers*, 45 U.S. (4 How.) 576 (1846) 9
United States v. *Antelope*, 430 U.S. 641 (1977) 6, 7, 8, 9
United States v. *Lara*, 541 U.S. 193 (2004) 4, 5, 8
United States v. *McBratney*, 104 U.S. 621 (1882) 2
United States v. *Wheeler*, 435 U.S. 313 (1978) 3

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 8
Amend. V (Due Process Clause) ..... *passim*
Amend. XIV (Equal Protection Clause) ..... *passim*
Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733 8
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1162) 2
Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1856:
§ 8077(b), 104 Stat. 1892 4
§ 8077(d), 104 Stat. 1893 4
Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646 4
Assimilative Crimes Act, 18 U.S.C. 13 6
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* ... 3
25 U.S.C. 1301(2) 4, 5
25 U.S.C. 1301(4) 4, 9, 10
25 U.S.C. 1302 11
25 U.S.C. 1302(6) 12
25 U.S.C. 1302(7) 3

Statutes—Continued: Page

25 U.S.C. 1302(8) 3
25 U.S.C. 1302(10) 12
25 U.S.C. 1303 ..... 3, 12, 13
Indian Country Crimes Act, 18 U.S.C. 1152 2
Indian Major Crimes Act, 18 U.S.C. 1153 ..... 2, 4, 9, 10
25 U.S.C. 450j(h) 8

Miscellaneous:

S. Rep. No. 153, 102d Cong., 1st Sess. (1991) 4
S. Rep. No. 168, 102d Cong., 1st Sess. (1991) 4, 11

In the Supreme Court of the United States

No. 05-1285

THOMAS LEE MORRIS, A MINOR CHILD, ET AL., PETITIONERS

v.

JUDGE TANNER, JUDGE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT FOR THE FLATHEAD RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is *reprinted in* 160 Fed. Appx. 600. The opinion of the district court (Pet. App. 5-27) is reported at 288 F. Supp. 2d 1133.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4) was entered on December 22, 2005. A petition for rehearing was denied on March 22, 2006 (Pet. App. 56). On March 13, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 6, 2006, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (internal quotation marks and citations omitted). The United States may prosecute federal crimes of nationwide applicability to the same extent in Indian country as elsewhere. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that, with certain specified exceptions, federal criminal laws that apply in enclaves under exclusive federal jurisdiction also apply within Indian country. One exception is that offenses committed by one Indian against the person or property of another Indian are not subject to prosecution under Section 1152. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. *Negonsott*, 507 U.S. at 103. States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. *United States* v. *McBratney*, 104 U.S. 621 (1882). In addition, Congress has granted a number of States authority to exercise general jurisdiction over crimes committed by or against Indians in Indian country. See, *e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1162).

Indian Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as

a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Tribes have inherent sovereign power to prosecute their own members for violations of tribal law. *Id.* at 326. By virtue of their dependant status, however, Tribes have been divested of their inherent power to prosecute non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, imposes a number of limitations on Tribes that are analogous to those that the Constitution imposes on the United States and the States. For example, ICRA extends due process and equal protection rights that parallel those arising under the Constitution. 25 U.S.C. 1302(8). ICRA also affords a habeas corpus remedy in federal court. 25 U.S.C. 1303. Tribal courts have jurisdiction only over misdemeanor offenses, and are limited by ICRA to imposing punishments of up to one year in prison and a fine of $5000. 25 U.S.C. 1302(7).

For many years, tribal courts exercised criminal jurisdiction over nonmember Indians. In *Duro* v. *Reina*, 495 U.S. 676, 687-686 (1990), however, the Court held that the Tribes' dependent status had divested them of that authority. *Duro* created a potentially significant jurisdictional gap in law enforcement in Indian country. After *Duro*, unless an offense committed by a nonmember Indian against an Indian fell within the Indian Major Crimes Act or a federal law of general applicability, the United States, States, and Tribes all lacked authority to prosecute it. That presented a significant problem because many reservations have a large population of nonmember Indians.

In response to *Duro*, Congress enacted legislation that reaffirmed inherent tribal jurisdiction over non-

member Indians, thereby closing the jurisdictional gap that *Duro* had created. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (25 U.S.C. 1301(2)). The legislation amended ICRA's definition of a Tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). ICRA defines "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" under 18 U.S.C. 1153. 25 U.S.C. 1301(4).

The initial legislation was effective until September 1991. § 8077(d), 104 Stat. 1893. After the legislation was enacted, Congress conducted "extensive hearings." S. Rep. No. 153, 102d Cong., 1st Sess. 12-13 (1991). As a result of those hearings, Congress made the legislation permanent. Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646. Congress decided that permanent legislation was appropriate because nonmember Indians "own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," receive many tribal services, and have other close ties to Tribes. S. Rep. No. 153, *supra*, at 7. Congress also relied on the fact that "[u]ntil the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years." S. Rep. No. 168, 102d Cong., 1st Sess. 2 (1991).

In *United States* v. *Lara*, 541 U.S. 193, 200 (2004), the Court held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." The Court did not decide whether tribal jurisdiction over nonmem-

ber Indians violates equal protection or due process. *Id.* at 208-209.

2. Petitioner Thomas Lee Morris is an enrolled member of the Minnesota Chippewa Tribe. Pet. App. 6. On June 13, 1999, petitioner was cited for speeding on the Flathead Indian Reservation, the home of the Confederated Salish and Kootenai Indian Tribes. *Ibid.* Petitioner was ordered to appear in the Flathead Reservation Tribal Court. *Ibid.*

Petitioner filed a motion to dismiss, claiming that the tribal court lacked jurisdiction over him. Pet. App. 6. The tribal court denied the motion. *Ibid.* Petitioner filed an action in the United States District Court for the District of Montana against respondent Judge Tanner, the judge in the tribal proceeding against petitioner. *Id.* at 40-42. Petitioner alleged, *inter alia*, that the ICRA amendments that give Tribes jurisdiction over nonmembers, 25 U.S.C. 1301(2), violate due process and equal protection. Pet. App. 44-45.

The district court granted respondent Tanner's motion to dismiss without considering petitioner's constitutional claims. Pet. App. 38-39. The court of appeals vacated and remanded for the district court to consider those claims. *Id.* at 30-37. On remand, the United States intervened to defend the constitutionality of the ICRA amendments. *Id.* at 8-9.

The district court then rejected petitioner's equal protection and due process claims. Pet. App. 5-27. The court held that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), "Indian [status] for the purpose of federal legislation is a political rather than racial designation," Pet. App. 19, and that the ICRA amendments are therefore subject to rational basis review. *Id.* at 22. The court held that the ICRA amendments satisfy the rational

basis test because they eliminate a gap in the enforcement of the laws against nonmember Indians who commit crimes on reservations. *Id.* at 22-23. The court rejected petitioner's due process claim on the ground that ICRA provides due process protections and includes a habeas remedy in federal court. *Id.* at 23-25.

3. The court of appeals affirmed. Pet. App. 1-3. The court held that its recent decision in *Means* v. *Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), had rejected equal protection and due process challenges to the ICRA amendments and that it was "bound by *Means* to reject [petitioner's] challenges as well." Pet. App. 2-3.

In *Means*, the court of appeals held that when the ICRA amendments state that they apply to "all Indians," that means "all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." 432 F.3d at 930. The court noted that under *Mancari*, such a distinction is political rather than racial and does not violate equal protection provided that it can be tied rationally to the fulfillment of Congress's unique obligations toward Indians. *Id.* at 932-933. The *Means* court held that the ICRA amendments satisfy that standard because they further the Tribes' ability to maintain order within their reservation boundaries. *Id.* at 933.

The *Means* court also relied on the holding in *United States* v. *Antelope*, 430 U.S. 641 (1977), that the application of the Indian Major Crimes Act to tribal members is constitutional even when it results in less favorable treatment than that accorded to persons prosecuted under the Assimilative Crimes Act, 18 U.S.C. 13, because the Indian Major Crimes Act applies to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities." *Means*, 432 F.3d at 934

(citing *Antelope*, 430 U.S. at 645 (citation omitted)). The *Means* court perceived "no sound distinction in principle between *Antelope* and this case." *Ibid.* The *Means* court added that petitioner had the option to renounce tribal membership and thereby avoid tribal jurisdiction. *Ibid.*

In *Means*, the court of appeals also held that Means' as-applied due process challenge was premature because his prosecution had been stayed. 432 F.3d at 935. The *Means* court held that the ICRA amendments are not facially invalid under the Due Process Clause. The court observed that (1) ICRA affords all criminal protections conferred by the Constitution except for the right to grand jury indictment and the right to appointed counsel, (2) the right to grand jury indictment does not apply to misdemeanors, and (3) the right to appointed counsel is conferred by the Navajo Bill of Rights. *Ibid.*

ARGUMENT

1. Petitioner contends that the ICRA amendments violate equal protection because they subject Indians to tribal jurisdiction on the basis of race. That contention is without merit and does not warrant review.

This Court has consistently upheld against equal protection challenges Acts of Congress that treat tribally-affiliated Indians differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The Court has explained that such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions." *Ante-*

lope, 430 U.S. at 646-647. The Constitution expressly identifies "Indian Tribes" as distinct entities, Art. I, § 8, Cl. 3, and this Court has consistently held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes," *United States* v. *Lara*, 541 U.S. 193, 200 (2004). Furthermore, in contrast to "immutable characteristic[s]" such as race, sex, and national origin that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is voluntary, and it may be relinquished at any time. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990). Accordingly, the Court has held that laws that treat tribally-affiliated Indians differently from others withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Section 1301(2), as amended after *Duro*, regulates the relationship among Tribes and the individual Indians affiliated with those Tribes. Just as Congress may, for example, define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal affiliation to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Indeed, Congress has long excepted "crimes committed by one Indian against the person or property of another Indian" from the scope of general federal criminal jurisdiction in Indian country, see Act of

June 30, 1834, ch. 161, § 25, 4 Stat. 733; 18 U.S.C. 1152, choosing to leave Indians "as regard[s] their own tribe, *and other tribes also*, to be governed by Indian usages and customs," *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (emphasis added).

Petitioner contends (Pet. 11) that the ICRA amendments create a racial classification rather than a political classification because they apply to "all Indians." That contention is incorrect. The ICRA amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18." 25 U.S.C. 1301(4). In *Antelope*, the Court held that the term "Indian" in Section 1153 creates a political classification rather than a racial classification. 430 U.S. at 645-647. The Court explained that the term "Indian" in Section 1153 does not refer to all persons who are racially Indians, but to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. *Id.* at 646 & n.7. The Court further explained that the criminal defendants in that case "were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." *Id.* at 646.

Because the ICRA amendments incorporate the definition of Indian in 18 U.S.C. 1153, the analysis in *Antelope* is controlling here. Like 18 U.S.C. 1153, the ICRA amendments do not apply to all persons who are racially Indians, but only to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. Furthermore, petitioner is not subject to tribal jurisdiction because of his race, but because he is an enrolled member of the Minnesota Chippewa Tribe. See Pet. App. 6.

This direct relationship between Section 1301(4) and 18 U.S.C. 1153 is not a matter of mere definitional convenience. Section 1301(4) forms an essential component of the comprehensive jurisdictional regime in Indian country, and thereby closes the jurisdictional gap created by *Duro*. Under that regime, as restored by ICRA, specified major crimes committed by one tribally-affiliated Indian against another in Indian country are subject to federal prosecution under 18 U.S.C. 1153, while more minor crimes are subject to prosecution by the Tribe on whose reservation the crime was committed. The power of Congress, recognized in *Antelope*, to provide protection for Indians by ensuring that violators are subject to prosecution, applies equally to the provision for federal prosecution under 18 U.S.C. 1153 and the provision for tribal prosecution under 25 U.S.C. 1301(4).

Petitioner's reliance (Pet. 18) on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), is misplaced. In *Adarand*, the Court held that all racial distinctions are subject to strict scrutiny. *Id.* at 227. Because the ICRA amendments create a political classification rather than a racial classification, *Adarand* is inapposite, and the sole equal protection question is whether the ICRA amendments are rationally tied to the fulfillment of Congress's obligations toward Indians. See *Mancari*, 417 U.S. at 555.

The ICRA amendments satisfy that standard in two ways. First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 390-391 (citation omitted), by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes

who voluntarily enter its territory. A Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, 102d Cong., 1st Sess. 6-7 (1991).

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by nonmember Indians. See *Duro*, 495 U.S. at 696. Because the United States and the States often lack jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by nonmember Indians. S. Rep. No. 168, *supra*, at 4. And even aside from questions of jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by nonmember Indians. Accordingly, the ICRA amendments are rationally related to the legitimate goals of advancing tribal self-government and protecting the safety of the reservation community, and they do not violate the Constitution's equal protection guarantee.

2. Petitioner's due process claim is equally without merit. ICRA guarantees protections to criminal defendants in tribal court that are analogous to the protections that the Constitution guarantees criminal defendants in federal and state courts. See 25 U.S.C. 1302. Among other protections, criminal defendants in tribal court are entitled to a speedy and public trial; they must be informed of the nature of the charges against them; they have a right to confront the wit-

nesses against them; they have a right to compulsory process to obtain witnesses on their behalf; they have the right, at their own expense, to the assistance of counsel; and they have the right to a trial by jury for any offense punishable by imprisonment. 25 U.S.C. 1302(6) and (10). Criminal defendants also have a right to seek federal habeas corpus review to challenge detentions that are ordered by an Indian Tribe. 25 U.S.C. 1303.

ICRA does not expressly provide a right to appointed counsel for persons who cannot afford an attorney. But since petitioner is charged with a traffic offense that carries a penalty of a $100 fine, see Pet. App. 48, the right to appointed counsel is not implicated in this case. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (right to appointed counsel applies when a term of imprisonment is imposed). In any event, the Confederated Salish and Kootenai Indian Tribes provide counsel to indigent defendants. See Aff. of James Taylor 1. In addition, while ICRA does not guarantee the right to an indictment by a grand jury for infamous crimes, that right is not implicated by petitioner's traffic offense. See *Means* v. *Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005).

Petitioner complains (Pet. 13) that he will not receive a jury trial in tribal court. But the constitutional right to a jury trial does not apply to petitioner's "petty" traffic offense. *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 543-545 (1989); *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970). As noted above, in cases in which an offense is punishable by imprisonment, ICRA protects the right to a jury trial. See 25 U.S.C. 1302(10).

Petitioner asserts (Pet. 17) that there are nonmember Indians in tribal jail facilities who have not received the protection of the Constitution. But petitioner fails

to identify the constitutional protections that such persons have been denied. In any event, persons who are incarcerated may challenge their incarceration through federal habeas corpus review. See 25 U.S.C. 1303. Petitioner is not subject to incarceration and lacks standing to raise claims on behalf of those who are.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
WILLIAM B. LAZARUS
E. ANN PETERSON
R. JUSTIN SMITH
Attorneys

JUNE 2006

MOTION FILED

JUN 9 - 2006

(4)

No. 05-1285

In The Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

Petitioners,

v.

TANNER, Judge of the Confederated Salish and Kootenai Indian Tribal Court For the Flathead Reservation, and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

J. SCOTT DETAMORE*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation (MSLF) respectfully moves this Court, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amicus curiae* brief in support of Petitioners. Petitioners and Respondent, United States of America, granted consent to MSLF to file this *amicus* brief. Respondent Tanner, though, opposed the filing of this brief.

MSLF is a non-profit, public interest legal foundation that litigates in the public interest to promote and protect individual liberties guaranteed by the United States Constitution. It also litigates to ensure limited and ethical government that functions within the confines of lawful statutes and the Constitution. Moreover, MSLF has a long history of litigating in the areas of individual liberties and limited and ethical government, in such cases as *Adarand Constructors, Inc. v. Peña*[1] and *Wygant v. Jackson Board of Education*,[2] where it represented the Petitioners before this Court. Therefore, MSLF is particularly able to assist this Court in this case.

Furthermore, MSLF's members bring to this case a different and wider perspective than do Petitioners. MSLF has many members who live on or near Indian reservations. These members are concerned with the civil and criminal jurisdiction of Tribes and the impact that tribal jurisdiction has on their every-day lives and business dealings. This Court, in a series of cases, recognized limits

---

[1] 515 U.S. 200 (1995).

[2] 476 U.S. 267 (1986).

on the inherent sovereignty of Indian Tribes.[3] Nonetheless, this Court recently determined, in *United States v. Lara*,[4] that Congress, under its plenary power over Indian Tribes, may "restore" inherent sovereignty to the Tribes. The means Congress chose in that case was the 1990 amendment to the Indian Civil Rights Act, providing that Tribes may prosecute all Indians criminally, irrespective of tribal membership.[5]

Because Tribes' inherent sovereign power is not constrained by the Bill of Rights, or any other provision of the Constitution, Congress's power to "restore" sovereignty creates a grave constitutional crisis of significant concern

---

[3] *Oliphant v. Suquamish Indians*, 435 U.S. 191 (1978) (no inherent jurisdiction to try and punish non-Indians); *United States v. Montana*, 450 U.S. 544 (1980) (no inherent jurisdiction to regulate non-Indian hunting and fishing on fee land owned by non-member within reservation); *Duro v. Reina*, 495 U.S. 676 (1989) (no inherent jurisdiction to prosecute non-member Indian criminally; *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (no inherent jurisdiction to zone fee land owned by non-Indians within "open" areas of reservation); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Flood Control Act abrogated Tribe's rights under treaty to regulate hunting and fishing by non-Indians in area taken for dam and reservoir project, so no inherent jurisdiction over non-Indian hunting and fishing in taken areas); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no inherent tort jurisdiction against non-members for accident on public highway running through reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (no inherent jurisdiction to adjudicate tort claims or § 1983 claims arising from state official's execution of process on reservation land for evidence of off-reservation crime); *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001) (no inherent authority to impose tax on non-member guests of hotel on non-Indian owned land within reservation).

[4] 541 U.S. 193 (2004).

[5] 25 U.S.C. § 1301(2) (104 Stat. 1892-93 and 105 Stat. 646 set out the amendment itself).

to MSLF's members.[6] It does so because that power allows Congress to strip U.S. citizens of basic constitutional rights and subject them to criminal prosecution by a third-party sovereign not envisioned by the Founding Fathers when they created the dual-sovereign constitutional structure. Consequently, this Court should hold that the Fifth Amendment Due Process Clause prevents Congress from depriving U.S. citizens of constitutional rights in this manner.

This Court should also hold that Congress's adoption of the 1991 Amendments to the Indian Civil Rights Act violated the Constitution's equal protection guarantee. Any classification adversely affecting fundamental constitutional rights requires strictest scrutiny, which this legislation cannot survive. That Congress deprived a racial group – American Indians – of their constitutional rights is doubly damning, and should receive "doubly strict scrutiny," damning once because Congress created a classification that eradicates constitutional guarantees for some persons, and damning once again because the classification is race based.

Therefore, Congress deprived some United States citizens of both Due Process and Equal Protection, contrary to the Fifth Amendment to the Constitution. Even more shocking is that there is no principled reason, using this Court's rationale in *Lara*, that Congress may not "restore" tribal inherent sovereignty over all persons found in Indian Country, regardless of their race or tribal status, specifically including many of MSLF's members. Indeed,

---

[6] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Congress might even restore sovereignty over capital crimes and the death penalty. What is more, the Tribe and the United States argue here that Congress's plenary power to provide for the group rights of Tribes, *vis-à-vis* the individual constitutional rights of U.S. citizens, permits just that. Plus, they argue that courts must review actions taken under Congress's plenary power using rational basis scrutiny only, when strict scrutiny clearly applies. If this argument proves correct, the implications for the rights of U.S. citizens, and the nation's constitutional system, are stunning.

Fortunately, *Lara* did not decide these issues. Rather, this Court wisely reserved them for another day. And, with this case, that day has arrived. This Court must resolve the conflict between Congress's plenary power to "restore" inherent sovereignty to Tribes, and the rights of all American citizens, including tribal members, under the Constitution. This case presents this Court with an opportunity to remove the confusion that surrounds this Court's Indian Law jurisprudence by declaring that Congress may not subject American citizens to prosecution by tribal courts that are not constrained by the United States Constitution, whether on the basis of race, political affiliation, or for any other reason.

MSLF is particularly able to assist the Court in understanding these issues and the critical importance of hearing this case. MSLF and its members take a much broader view of the importance of hearing this case than that presented by Petitioners, and believe that this Court should order that the attached *amicus curiae* brief be received and considered filed.

WHEREFORE, Mountain States Legal Foundation respectfully moves this Court for leave to participate in this Petition for *Writ of Certiorari* as *amicus curiae* in support of Petitioners and to file the accompanying *Amicus Curiae* Brief.

DATED this 9th day of June 2006.

Respectfully submitted:

J. SCOTT DETAMORE*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS 1

TABLE OF AUTHORITIES ii

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE PETITION 4

I. THIS COURT MUST RESOLVE THE CONFLICT BETWEEN INTERESTS OF INDIAN TRIBES, UNDER THEIR INHERENT SOVEREIGNTY, AND RIGHTS OF INDIVIDUAL AMERICAN CITIZENS, UNDER THE U.S. CONSTITUTION AND ITS BILL OF RIGHTS 4

A. Congress Violates The Due Process Clause By Subjecting Any U.S. Citizen To Criminal Prosecution By Indian Tribal Courts 7

B. Congress Violates The Equal Protection Component Of The Due Process Clause ... 12

1. A Classification Depriving Any U.S. Citizen Of Fundamental Rights Requires Strict Scrutiny 12

2. A Racial Classification Is Constitutionally Suspect 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 13, 14, 15, 16

Atkinson Trading Company v. Shirley, 532 U.S. 645 (2001) 2

Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989) 2

Bridges v. Wixon, 326 U.S. 135 (1945) 15

Clark v. Jeter, 486 U.S. 456 (1988) 12

Colorado v. Spring, 479 U.S. 564 (1987) 10

Dawevendewa v. Salt River Project Agricultural Improvement and Power District, 154 F.3d 1117 (9th Cir. 1998) 14

Duro v. Reina, 495 U.S. 676 (1990) 2, 4, 5, 9, 12

Flemming v. Nestor, 363 U.S. 603 (1960) 15

Harper v. Virginia State Board of Elections, 393 U.S. 663 (1966) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 9

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 8

Low Wah Suey v. Backus, 225 U.S. 460 (1912) 15

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 7

McCulloch v. Maryland, 4 Wheat, 316, 4 L.Ed. 579 (1819) 7

Morton v. Mancari, 417 U.S. 535 (1974) 15, 16

NAACP v. State of Alabama, 357 U.S. 449 (1958) 11

TABLE OF AUTHORITIES – Continued

Page

Nevada v. Hicks, 533 U.S. 353 (2001) 2

New York v. United States, 505 U.S. 144 (1992) 7

Oliphant v. Suquamish Indians, 435 U.S. 191 (1978) 2

Printz v. U.S., 421 U.S. 898 (1997) 7

Rice v. Cayetano, 528 U.S. 495 (2000) 13, 16

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 3, 4

Silesian Am. Corp. v. Clark, 332 U.S. 469 (1947) 15

South Dakota v. Bourland, 508 U.S. 679 (1993) 2

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 2

Talton v. Mayes, 163 U.S. 376 (1896) 3, 4

U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923) 15

United States v. Lara, 541 U.S. 1932 (2004) 3, 4, 5, 8, 9

United States v. Montana, 450 U.S. 544 (1980) 2

United States v. Rogers, 45 U.S. 567 (1846) 11, 14

Wong Wing v. U.S., 163 U.S. 228 (1896) 15

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I 2, 10, 13, 15, 16

U.S. Const., amend. V ..... *passim*

U.S. Const., amend. VI 8, 15

U.S. Const., amend. VIII 15

U.S. Const., amend. X 7

U.S. Const., amend. XIV 4, 15

TABLE OF AUTHORITIES – Continued

Page

U.S. Const., art. I, § 8, cl. 3 5

U.S. Const., art. II, § 2, cl. 2 5

STATUTES

25 U.S.C. § 1301(2) (104 Stat. 1892-93 and 105 Stat. 646, 1990 and 1991 amendments, respectively, to the Indian Civil Rights Act) 2

RULE

Supreme Court Rule 37 1

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS[1]

SUMMARY OF ARGUMENT

This Court must resolve the conflict between the group rights of Tribes, granted them by Congress, and the individual constitutional rights of U.S. citizens, guaranteed them by the U.S. Constitution. This Court must hear this case to declare that Congress, in promoting Indian Tribes' self-government, may not deprive any U.S. citizen of the fundamental guarantees of the Constitution and its Bill of Rights.

This conflict results because of the ambiguous Indian law jurisprudence of this Court and resultant congressional action. This Court holds that Indian Tribes possess inherent powers of sovereignty and that the U.S. Constitution does not apply to Tribes' exercise of these sovereign powers. Consequently, criminal prosecutions by Tribes do not afford U.S. citizens the constitutional guarantees afforded by the Bill of Rights.

Though originally unlimited, this sovereign power is now the subject of regulation by Congress, under its plenary power over Indian Tribes. Thus, Congress determines how much or how little sovereign power, for example, criminal jurisdiction, a Tribe enjoys. This case arose because Congress gave Indian Tribes criminal jurisdiction over all U.S. citizens of Indian ancestry. Worse yet, there is

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

no principled reason, under this Court's Indian law jurisprudence, why Congress may not extend tribal criminal jurisdiction to include all citizens, all crimes, and all punishments.

Congress's decision to grant Tribes the inherent sovereign power to prosecute U.S. citizens criminally deprives those citizens of their basic constitutional protections because it subjects them to the criminal jurisdiction of an extra-constitutional tribunal that the Constitution does not contemplate. As a result, they are denied Due Process of Law.

In the case presented here, however, Congress did not deprive all U.S. citizens of their constitutional rights, but only those citizens who are of Indian ancestry. Congressional classifications that deny some, but not all, citizens their constitutional rights are inherently suspect, whether those classifications are political (tribal) or racial (Indians). When those classifications are racial, as they are here (Indians and non-Indians), they are doubly suspect. Consequently, Congress, by subjecting only American Indians to tribal criminal jurisdiction, denied those citizens Equal Protection of Law, also guaranteed by the Fifth Amendment.

Historically, this Court has avoided these constitutional difficulties, with respect to Indian citizens who are members of the prosecuting Tribe, by utilizing the fiction that these citizens, by consenting to be, and to remain, tribal members, waive their constitutional rights. But this "consent" is illusory. It does not comport with the requirements of this Court for waiving constitutional rights. Furthermore, it infringes on the First Amendment Freedom of Association of citizens of Indian ancestry because

Congress conditions the freedom of those citizens to associate with Tribes on their waiver of basic constitutional protections.

The Ninth Circuit dodged the Due Process issues entirely and tried to avoid the Equal Protection claims by disingenuously designating tribal membership a political classification. Of course, such membership is not political; it is racial because only persons of Indian ancestry may join. In fact, non-Indians, though they may voluntarily choose to become tribal members, may not consent to tribal criminal jurisdiction; only persons of Indian ancestry may do so. Thus, the Ninth Circuit skirted the real issue – whether Congress's plenary power over Tribes, when exercised to deprive U.S. citizens of fundamental protections, justifies rational basis review instead of strict scrutiny. So phrased, the answer can only be no; strict scrutiny is required here.

In the past, this Court reserved the questions presented by these constitutional difficulties for another day. That day is at hand. This Court must take this case and this issue, which it has avoided for too long, and finally resolve the conflict between Congress's plenary power over Tribes and the limits of Congress's powers to affect adversely the individual constitutional rights of United States citizens.

REASONS FOR GRANTING THE PETITION

I. THIS COURT MUST RESOLVE THE CONFLICT BETWEEN INTERESTS OF INDIAN TRIBES, UNDER THEIR INHERENT SOVEREIGNTY, AND RIGHTS OF INDIVIDUAL AMERICAN CITIZENS, UNDER THE U.S. CONSTITUTION AND ITS BILL OF RIGHTS.

The federal republic created by the U.S. Constitution contemplates only two sovereign governments – the United States and the several States, which must each respect the proper sphere of the other. Moreover, citizens of one sovereign are citizens of the other, possessing rights and duties as to both.[2] And the Bill of Rights and the Fourteenth Amendment protect those citizens before the tribunals of both sovereigns.

The same is not true for citizens appearing before tribal tribunals because this Court recognizes that Indian Tribes retain inherent sovereignty to control their own internal relations and to preserve their unique customs and social behavior.[3] That is, tribal legislation and adjudication, pursuant to that inherent sovereign power, are not constrained by the Bill of Rights because Tribes pre-exist the Constitution and are neither States nor part of the federal government.[4] For example, no constitutional constraints apply to tribal courts that prosecute U.S. citizens criminally under the Tribes' inherent sovereignty. Moreover, this Court leaves the extent of the powers of

---

[2] *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J. concurring).

[3] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

[4] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

those sovereigns to the discretion of Congress, under its plenary power to legislate with respect to Indian Tribes, which derives from the Indian Commerce and Treaty Clauses.[5] Consequently, under this Court's current jurisprudence, Congress may extend the reach of those sovereign powers to their original scope, including the rights to prosecute all persons in Indian Country criminally, regardless of the crimes, punishments, or constitutional rights denied the accused.

Congress, therefore, determines which U.S. citizens to subject to criminal prosecution by non-constitutional tribal courts and which U.S. citizens not to subject to such prosecution. So when this Court held in *Duro* that a Tribe's inherent sovereign jurisdiction extends only to its members,[6] Congress amended the Indian Civil Rights Act to extend that sovereignty to all Indians, regardless of tribal membership. When that Act was challenged in *Lara*, this Court held that Congress had acted within its authority to "restore" inherent sovereignty.[7] Moreover, under *Lara*, there is no principled reason why Congress may not "restore" tribal sovereign powers to include criminal jurisdiction over all persons in Indian Country, Indian and non-Indian alike.

Fortunately, *Lara* decided only the double jeopardy question, and left for another day the critical issue of the

---

[5] *Lara*, 541 U.S. at 200-02 (U.S. Const., art. I, § 8, cl. 3, and art. II, § 2, cl. 2, respectively).

[6] *Duro*, 495 U.S. at 694-95.

[7] *Lara*, 541 U.S. at 200-02.

conflict between tribal sovereignty and individual constitutional rights.[8] That day has arrived, and this Court should now resolve that conflict. The critically important issue now presented, and what this Court must grant *certiorari* to decide, is whether Congress may subject any U.S. citizen to criminal prosecution by a sovereign that was not contemplated by the Constitution, thereby depriving that citizen of the protections guaranteed, not only by the basic structure of the Constitution, but also by the Bill of Rights.

This question presents three crucial issues:

- Whether Congress violates the Due Process Clause of the Fifth Amendment by subjecting a U.S. citizen to criminal prosecution by a non-constitutional tribunal?
- Whether Congress violates the Equal Protection component of the Due Process Clause by subjecting some U.S. citizens, but not others, to criminal prosecution by a non-constitutional tribunal?
- Whether Congress's act of subjecting some U.S. citizens, but not others, to criminal prosecution by a non-constitutional tribunal requires strict scrutiny?

---

[8] *Id.* at 209.

A. Congress Violates The Due Process Clause By Subjecting Any U.S. Citizen To Criminal Prosecution By Indian Tribal Courts.

The constitutional power that Congress exercises over Indian Tribes does not empower Congress to deprive individual U.S. citizens of rights protected by the Constitution. That is, the power to regulate and protect group interests does not empower Congress to deprive individuals of their fundamental constitutional rights. Tribal group interests, protected by Congress, simply may not trump individual rights that the Bill of Rights protects.

The federal government is one of enumerated powers:

> The Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. See, *e.g., McCulloch v. Maryland,* 4 Wheat, 316, 405, 4 L.Ed. 579 (1819) ("This government is acknowledged by all to be one of enumerated powers"). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. Cf. *New York v. United States,* 505 U.S. 144 (1992).[9]

There is no text in the Constitution that allows Congress to deprive individual U.S. citizens of fundamental constitutional rights simply because Congress has the power to regulate and protect Indian Tribes. Indeed, some argue

---

[9] *Printz v. U.S.*, 421 U.S. 898, 936 (1997) (Thomas, J. concurring).

that there is no textual support at all in the Constitution for Congress's plenary power over Tribes.[10]

In fact, even if there were such text, the Bill of Rights is explicit in protecting "persons" from overreaching congressional regulation under Congress's other powers.[11] In other words, the power conferred on Congress to regulate Indian Tribes, "like the other great substantive powers of Congress, is subject to the Fifth Amendment."[12] Thus, Congress may not protect Tribes, or any group, at the expense of an individual's constitutional rights.

Let us be clear. When a Tribe acts extra-constitutionally upon anyone, it does so only because Congress subjected that U.S. citizen to tribal jurisdiction. One may not argue that the Tribe, not Congress, prosecuted the individual criminally; when the Tribe exercises inherent sovereignty over an individual it does so only by grant of Congress. Thus, because Congress subjects U.S. citizens to criminal prosecution by a sovereign outside the basic structure of the Constitution, a sovereign that is unconstrained by the Constitution, it is Congress, not the Tribe, that deprives the citizen of his constitutional rights under the Due Process Clause and the equal protection guarantee. Yet, beyond its plenary power regarding Indian Tribes, the United States and the Tribe are unable to provide this Court any constitutional basis for denying any American citizen the rights set forth in the Bill of Rights.

---

[10] *Lara*, 541 U.S. at 215 (Thomas, J. concurring).

[11] "No person shall be. . . . " U.S. Const., amend. V. "[T]he accused shall enjoy. . . . " U.S. Const., amend. VI.

[12] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

In fact, there is no constitutional basis for denying any American citizen the benefit of the very structure of the Constitution: "political freedom guaranteed to citizens by the federal structure is a liberty both distinct from, and every bit as important as, those freedoms guaranteed by the Bill of Rights."[13] Consequently, any prosecution of a U.S. citizen by tribal courts is unconstitutionally void. This Court should hear this case to hold just that.

Moreover, this Court should not limit its holding to non-members of the prosecuting Tribe or to Indians. It should declare that no citizen, including members of the prosecuting Tribe, may be prosecuted criminally by tribal courts. Even though this Court has sanctioned Congress's decision to subject tribal members to criminal jurisdiction of their own Tribe, it has done so based on the chimera of "consent of the governed."[14] But this consent is only illusory. This Court may no longer seriously hold that a tribal member voluntarily consents to the loss of his constitutionally guaranteed rights by becoming and remaining a tribal member.

This is so because U.S. citizens may not waive their constitutional rights so easily. That is, courts may "not presume acquiescence in the loss of fundamental rights."[15] Courts are obliged, therefore, to establish that citizens make any such waivers knowingly and voluntarily.[16] Thus, any waiver of fundamental constitutional rights may occur only "with a full awareness both of the nature of the right

---

[13] *Lara*, 541 U.S. at 214 (Kennedy, J., concurring).

[14] *Duro*, 495 U.S. at 694.

[15] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[16] *Id.* at 464-65.

being abandoned and the consequences of the decision to abandon it."[17]

Merely joining a Tribe, or remaining a tribal member, cannot meet this standard for waiving basic constitutional rights. Most tribal members are enrolled by their parents at birth. Such enrollment hardly constitutes a knowing, intelligent waiver of constitutional rights. In reality, this so-called waiver by consent is no more than a contrived fiction to promote tribal self-government at the expense of the individual constitutional rights of a Tribe's members. Congress may not rely on this fiction because, under this chimera, tribal members lose their constitutional rights, possessed by all other U.S. citizens, upon their tribal enrollment at birth. Moreover, in order to regain these constitutional rights, they must reject their Tribe, their culture, and their heritage, and forego any right to participate politically or economically in their Tribe.

Furthermore, the Court's reasoning threatens a person of Indian ancestry's First Amendment right of Freedom of Association. That is, with the sanction of this Court, Congress conditions the right of a citizen of Indian ancestry to associate with an Indian Tribe and take part in its political life, governance, benefits, culture, and otherwise, upon the waiver of his fundamental constitutional rights. Additionally, Congress implies that the only manner in which an American Indian may reclaim the constitutional rights implicitly waived for him in his infancy, by his parents on his enrollment as a tribal member, is for him, as an adult, to resign his tribal membership. That which Congress demands of American Indians – that to be

---

[17] *Colorado v. Spring*, 479 U.S. 564, 573 (1987).

full citizens of this country and enjoy the constitutional guarantees of citizenship, they must refrain from associating with those with whom they share a common racial and cultural heritage – Congress could demand of no other group of citizens.[18]

That this action is unconstitutional is evident from the fact that, under current law, only Indians may consent to the loss of constitutional rights by becoming tribal members.[19] If the non-Indian in *Rogers*, who consciously chose tribal membership as an adult may not consent to the loss of his constitutional rights, then an Indian, whose parents enrolled him as a child, may not be presumed to have knowingly waived his constitutional rights by failing to disclaim his tribal membership as an adult. Indeed, one could better support tribal jurisdiction by proposing that a person consents to the waiver of constitutional rights by his mere voluntary presence in Indian Country, than by this illusory "consent of the governed" theory. Nonetheless, neither presumption survives strict scrutiny.

Therefore, this Court must grant the Petition and resolve the conflict between the inherent sovereignty of Tribes and the constitutional rights of individual United States citizens, including Indian citizens.

---

[18] *NAACP v. State of Alabama*, 357 U.S. 449, 460-61 (1958) ("Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty assured by the Due Process Clause' . . . It is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters.").

[19] *United States v. Rogers*, 45 U.S. 567, 772-73 (1846) (Tribe has no jurisdiction to try non-Indian, married to Indian and adopted by Tribe, who kills another non-Indian adopted by another Tribe, in Indian Country).

B. Congress Violates The Equal Protection Component Of The Due Process Clause.

1. A Classification Depriving Any U.S. Citizen Of Fundamental Rights Requires Strict Scrutiny.

Congress now subjects all Indians to the criminal jurisdiction of tribal courts, thereby depriving Indians of the fundamental rights guaranteed to all other U.S. citizens by the Bill of Rights. That is, to determine who receives the protection of the Bill of Rights in a criminal prosecution by tribal governments, and who does not, Congress classifies persons as Indians or non-Indians. Yet where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications that might invade or restrain them must be closely scrutinized and carefully confined."[20] Thus, if Congress, in enacting the "*Duro* Fix," adversely affects fundamental rights, it must demonstrate a compelling interest for doing so, and that the means chosen to promote that interest is narrowly tailored to achieve that interest. This is true whatever the classification may be.

As a result, Congress's action here cannot pass constitutional muster. Counsel can find no case in which Congress was held to have an interest so compelling that it may justify stripping a U.S. citizen of the basic constitutional protections afforded by the Bill of Rights in a criminal prosecution. Congress's power over Indian Tribes does not empower Congress to deprive some classes of

---

[20] *Harper v. Virginia State Board of Elections*, 393 U.S. 663, 670 (1966); *accord*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications . . . affecting fundamental rights are given the most exacting scrutiny.").

citizens, and not others, of basic constitutional rights, by subjecting them to the jurisdiction of a non-constitutional tribunal. Promoting a tribal group's interest in self-government is not sufficiently compelling to terminate the individual citizen's constitutional rights when prosecuted by that tribal government.

Furthermore, that Tribal membership in the prosecuting Tribe, much less membership in some other Tribe, constitutes an informed, voluntary waiver of constitutional rights has no more merit in the equal protection context than in the due process context. Additionally, that presumption restricts First Amendment rights of Freedom of Association.

2. A Racial Classification Is Constitutionally Suspect.

Courts must strictly scrutinize all racial classifications:[21]

> [A]ll racial classifications . . . must be analyzed . . . under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[22]

Congress's distinction between Indians and non-Indians is a constitutionally suspect racial classification requiring strict scrutiny even if fundamental constitutional rights were not involved. But even if limited to tribal Indians, or

---

[21] "Racial discrimination is that which singles out 'identifiable classes of persons solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano*, 528 U.S. 495, 496 (2000).

[22] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

to tribal members of the prosecuting Tribe, the classification remains racial because all tribal members must have Indian ancestry traced to a particular group of tribal Indians.[23] Indeed, only Indians may "consent" to the criminal jurisdiction of any tribal criminal court; a non-Indian cannot, even if a tribal member.[24] Thus, Congress's classification here, distinguishing between Indians and non-Indians, or based on tribal membership, is a suspect racial classification subject to strict scrutiny.

Congress may not justify this classification simply by its power to regulate and protect Indian Tribes. After all, the Bill of Rights protects individuals from congressional action regarding groups, such as Indian Tribes, not the other way around:

> [T]he Fifth . . . Amendment[ ] . . . protects *persons* not *groups*. It follows that all governmental action based on a race – a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' [cite omitted] – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.[25]

---

[23] "Discrimination on the basis of tribal membership constitutes national origin discrimination for purposes of Title VII, [which] prohibits . . . discriminating on the basis of 'race, color, religion, sex, or national origin.'" *Dawevendewa v. Salt River Project Agricultural Improvement and Power District*, 154 F.3d 1117, 1119 (9th Cir. 1998). "National origin includes not only nation of birth but also the place from which one's ancestors came, regardless of whether that place is now a nation." *Id.*

[24] *Rogers*, 45 U.S. at 772-73.

[25] *Adarand*, 515 U.S. at 227 (emphasis in original).

Indeed, Congress may not deprive even aliens of the constitutional rights it here denies to its own citizens.[26]

The Ninth Circuit disregarded this Court's Fifth Amendment equal protection jurisprudence, which establishes three important principles that courts must apply to equal protection cases. First, courts must treat all classifications involving race with skepticism. In other words, "*any* preference based on racial or ethnic criteria must necessarily receive a most searching examination."[27] Second, the courts must treat such classifications with consistency. That is, "the standard of review does not depend on the race of those burdened or benefited."[28] And third, courts must observe congruence. That is to say, "equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment."[29]

Instead, the Ninth Circuit, relying on *Morton v. Mancari*, reasoned that there was no racial classification involved here, only a political classification;[30] therefore, it did not require strict scrutiny. But *Mancari* either does not apply or should be overruled. First, *Mancari* did not deal with the Due Process Clause issues here, so it is inapposite

---

[26] *Flemming v. Nestor*, 363 U.S. 603 (1960) (bill of attainder, *ex post facto* law); *Silesian Am. Corp. v. Clark*, 332 U.S. 469 (1947) (Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135 (1945) (First Amendment); *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) (Fourth Amendment); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912) (Sixth Amendment); *Wong Wing v. U.S.*, 163 U.S. 228 (1896) (Fifth, Sixth, and Eighth Amendments).

[27] *Adarand*, 515 U.S. at 223 (emphasis supplied).

[28] *Id.*

[29] *Id.*

[30] 417 U.S. 535 (1974).

to that extent. Second, *Mancari* did not deal with a classification that deprives individuals of their basic constitutional rights, which requires strict scrutiny regardless of the character of the classification. In such a case as this, a political classification is no different from a racial one. Third, *Mancari* deals strictly with the *sui generis* issue of Congress's power to promote tribal self-government relative to the Bureau of Indian Affairs, and should be limited to its special facts.[31] Finally, to the degree that *Mancari* may stand for the proposition the Ninth Circuit ruled it does, then this Court must hear this case and overrule *Mancari* for the reasons stated above. That is, Congress's plenary power to protect Tribes' group rights does not permit Congress to escape strict scrutiny when making racial distinctions between and among individuals.[32]

Given the failure of the Ninth Circuit to apply this Court's equal protection jurisprudence, this Court must grant *certiorari* and resolve the conflict between Congress's power to assist, protect, and regulate Indian Tribes (group rights) and the limitations placed on that power with respect to the constitutional rights of individual U.S. citizens, guaranteed by the First and Fifth Amendments.

---

[31] *Mancari*, 417 U.S. at 554 (the "lives and activities [of Indians] are governed by the BIA in a 'unique fashion.'" Thus, "the legal status of the BIA is truly *sui generis*."); *Rice*, 528 U.S. at 520 ("[*Mancari*] was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis*.'").

[32] *Adarand*, 515 U.S. at 227.

CONCLUSION

There exist grave constitutional conflicts surrounding Indian Tribes. They are a third sovereign, not contemplated in this nation's dual-sovereign constitutional structure. They exist outside of, and are not constrained by, the Constitution. Their inherent sovereignty, though, extends only as far as Congress dictates. Congress has plenary power over Tribes and responsibilities toward them. But Congress's authority to exercise that power, or to fulfill those responsibilities, is subject to the protections afforded by the U.S. Constitution to all U.S. citizens. Congress may not act with respect to Tribes if doing so violates the constitutional rights of any individual U.S. citizen.

When Congress confers inherent sovereignty on Tribes to define and prosecute crimes, it deprives any U.S. citizen prosecuted by Tribes of the liberties guaranteed both by the U.S. Constitution itself and by its Bill of Rights. Moreover, Congress does so here by means of the additionally prohibited criteria of race. This Court must take this case and definitively resolve the conflict between the constitutional rights of individual U.S. citizens and the inherent sovereign powers granted Indian Tribes by Congress.

Respectfully submitted:

J. SCOTT DETAMORE*
Counsel of Record
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae